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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 9.

THOMAS C. ROWLEY, AS TREASURER OF CONVERSE COUNTY, STATE OF WYOMING; CHARLES M. HALL, AS TREASURER OF FREMONT COUNTY, STATE OF WYOMING; ALTA PEARL MASSEE, AS TREASURER OF NATRONA COUNTY, STATE OF WYOMING; AND D. A. SHOOPMAN, AS TREASURER OF NIOBRARA COUNTY, STATE OF WYOMING,

Petitioners,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, A CORPORATION,

Respondent.

RESPONDENT'S BRIEF.

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Petitioners,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, A CORPORATION,

Respondent.

RESPONDENT'S BRIEF.

OFFICIAL REPORTS OF OPINIONS DELIVERED BY THE COURTS BELOW.

C. & N. W. Ry. Co. vs. *Rowley,* 1 Fed. Sup. 729; *Rowley* v. *C. & N. W. Ry. Co.* 68 Fed. (2d) 527.

STATEMENT OF THE CASE.

PLEADINGS.

This is a suit brought by the Chicago and North Western Railway Company against the County Treasurers of four counties in the State of Wyoming to enjoin the collection of

taxes by the defendant County Treasurers upon valuations fixed by the Wyoming State Board of Equalization upon respondent's property located in the four counties, claimed by the respondent to be excessive and to have been arrived at by the State Board by arbitrary methods amounting to "fraud in law" (R. 157) and by the application of a wholly wrong principle of valuation.

Respondent's bill in equity (R. 1-8) alleges that respondent is an Illinois corporation; that petitioners are respectively the County Treasurers of Converse, Fremont, Natrona and Niobrara Counties, in the State of Wyoming, and that the amount involved as to each county exceeds the sum of $3,000.00. (R. 1 & 2). It is alleged that the valuation of $7,881,003.94, fixed by the State Board of Equalization upon respondent's property in the four Wyoming counties, was $2,031,433.94 in excess of the actual value of the property; that respondent's property had each year over a period of not less than five years been systematically and intentionally valued by the State Board at a figure approximately $2,000,000.00 in excess of its actual value; that in the year 1931 respondent's main-line track within the state was 278.35 miles; that the Wyoming property was worth only approximately one-half as much as the average mile of track; that these facts were, and during all the five-year period prior to 1931 had been, known to the State Board, and that the State Board, after fixing the system value of respondent's operating property at $375,285,902.00, arbitrarily and unlawfully fixed the value of the Wyoming property by using as one of the factors 3.29 per cent, representing the percentage of the total main-track mileage located in the State of Wyoming, without taking into account the inferior character and value of the Wyoming property as compared with the property located throughout the system; and that the over-valuation and resulting discrimination constitute a violation of respondent's rights

under the Fourteenth Amendment to the Federal Constitution. (R. 3, 4, 5)

The bill of complaint further alleges that while respondent's property was valued by the State Board at approximately 33⅓ per cent in excess of its actual value, the property of taxpayers generally throughout the state was assessed at approximately 60 per cent of its actual value, all with the fraudulent intent and purpose of placing upon respondent more than its just share of the taxes of the state and of discriminating against the respondent in violation of its rights under the provisions of the Federal Constitution, already mentioned. (R. 5)

Respondent's bill further alleges that the excessive valuation fixed by the State Board was by that Board apportioned to the various counties in which respondent's property was located, and certified by them to the respective County Assessors and by them placed upon the assessment rolls of the several counties, and that unless restrained the petitioners would distrain and sell respondent's property for the taxes claimed, and also that the taxes levied constitute a lien upon respondent's property and a cloud on its title. The bill contains the allegation that respondent, prior to the institution of the suit, had tendered to the respective petitioners the amounts due and admitted by respondent to be due them, and alleges that respondent has no adequate remedy at law. (R. 6, 7)

Petitioners' answer (R. 12-27) admits the allegations as to diversity of citizenship and the official capacity of the petitioners, denies the over-valuation of respondent's property, alleges that in fact it was greatly under-valued, admits that the State Board of Equalization considered the percentage of miles-of-road factor in arriving at the valuation of respondent's Wyoming property, admits the knowledge of the State Board as to the value and characteristics

of the respondent's Wyoming property as compared with its property throughout the system, and denies respondent's allegations as to discrimination.

The answer admits the valuation fixed upon respondent's property by the State Board as alleged in the bill, admits the allocation of the same to the several counties, the levy of taxes thereon in the amounts alleged, the certification by the Assessors to the Treasurers, the threatened collection and distraint by the Treasurers of respondent's property, and that the taxes levied constitute a lien on respondent's property and a cloud on the title thereto.

Orders.

Before the institution of the suit, the respondent tendered to the petitioners the amounts of taxes admitted by the respondent to be due, and upon presentation of its bill the Court entered a temporary restraining order (R. 8-10), fixing the amounts to be paid forthwith by the respondent to the petitioners, which payments were made, and later upon hearing an order for temporary injunction was issued. (R. 10-12) Upon conclusion of the trial, the case was taken under advisement and August 30, 1932 the trial judge filed his memorandum opinion (R. 27-32) denying jurisdiction, and upon re-argument of the question of jurisdiction and the re-submission of the case the trial judge, on November 9, 1932, entered his memorandum opinion (R. 32-43) holding that the Federal Court had jurisdiction in equity and that the respondent was entitled to the relief sought.

On December 17, 1932, the Court made and filed its findings of fact, conclusions of law and decree. (R. 43-48) It was specifically found by the Court, in addition to the jurisdictional facts as to diversity of citizenship and the amount involved, that respondent's main-track mileage in the State of Wyoming was 278.35 miles, being 3.29 per cent of the

entire system main-track miles; that the quantity, quality, cost and value of respondent's Wyoming property, measured upon the basis of miles-of-main-line track, was greatly less than throughout its system, which fact was well known to the State Board when it placed the value of $7,881,003.94 upon respondent's Wyoming property; that in arriving at the valuation of the Wyoming property the State Board first determined the value of respondent's system operating property to be $375,285,903.00 and that in arriving at the value of the Wyoming property the Board used as a factor the figure 3.29, representing the percentage of respondent's main-line-track mileage located within the state, without taking into account the fact that respondent's property in the State of Wyoming, measured on a mileage basis, was greatly less in quantity, quality, cost and value than the portion of its operating system located outside the state. (R. 45) In an opinion upon which the findings were based, the Court said (R. 41) that the use of the mileage factor by the Board "with the true facts before it, amounted to an arbitrary and unreasonable method, transcending plaintiff's constitutional rights".

The Court also found that the figure 1.89, representing, according to the testimony, the composite of the percentage of gross and net revenue within the state, was a mathematical error and that the figure should be 1.79. (R. 45)

The Court found that respondent's evidence failed to show an intentional and systematic under-valuation or omission of property other than that of respondent (R. 45); that the aforesaid valuation as fixed by the State Board was certified to the respective County Treasurers in the amount set out in the findings, which amounts were spread upon the county assessment rolls and by the Assessors certified to the petitioners for collection in the amounts specified in the findings. (R. 45-46).

The Court found, as conclusions of law, that the respondent had no adequate legal remedy (R. 46); that the trial court had jurisdiction to grant the equitable relief prayed for (R. 46); that the using of the percentage of main-line track located in the state as a factor in determining the value of respondent's Wyoming property without taking into account the difference in the character, quantity, quality, cost and value of the Wyoming property as compared with its property throughout the system constituted an arbitrary and unreasonable method and the application of a wholly wrong method and principle of determining the value of the Wyoming property. (R. 46).

The Court found that the State Board had properly used the traffic-units factor, represented by 1.58 per cent, and the rolling-stock factor, represented by 1.65 per cent; that the percentage 1.89 used by the Board, representing the operating-revenue factor, should be mathematically corrected to 1.79 per cent; that the average of the three percentages was 1.673, which, applied to the total valuation of $375,285,903.00, determined the actual value of respondent's Wyoming property to be $6,278,534.14, and the property to have been overvalued by the State Board to the extent of $1,602,468.90, constituting a substantial and arbitrary overvaluation. (R. 46, 47)

The decree ordered the payment by the respondent to the respective County Treasurers of the additional amounts therein specified, and permanently enjoined the petitioners from collecting or attempting to collect any additional amounts. (R. 47, 48)

ARGUMENT.

Evidence.

We desire to point out somewhat in detail the evidence in the case showing that the State Board of Equalization in arriving at the value of plaintiff's Wyoming property actually used as a factor the percentage of the system main line track located within the state without taking into account the fact that the character, cost and value of the average Wyoming mile is greatly and glaringly less than that of the system mile; and also the evidence showing that the actual value of plaintiff's Wyoming property was approximately two million dollars less than the value fixed upon it for taxation purposes by the State Board; and evidence showing that the plaintiff's property was substantially and arbitrarily over-valued to the extent of about two million dollars each year over a period of more than five years, notwithstanding the fact that all the information as to the actual value of the property was from year to year presented by the plaintiff to the State Board of Equalization, and notwithstanding that the true and uncontradicted facts were thus clearly before the Board.

First, the evidence as to the use of the miles of road factor: The question seems to have been settled by the findings of the trial court in which, in the seventh paragraph (R. 45) it is recited that, having determined the system value of plaintiff's operating property to be $375,285,903.00, the Board "adopted and used as a factor the percentage of plaintiff's main line track located in the State of Wyoming, to-wit, 3.29%, without taking into account the fact that plaintiff's property in the State of Wyoming measured on a mileage basis, is and was greatly less in quantity, quality,

cost and value than the portion of its operating system located outside the state of Wyoming''.

It would have been nearly impossible for the trial court to have come to any other conclusion; the order of the Board itself (R. 49-51) recites that the ''percentage of miles of railroad in Wyoming, 3.29%'', was used as one of four factors producing the average of 2.10% and that the system value of $375,285,902.00 was multiplied by 2.10% to obtain the figure of $7,881,003.94 which was, by that method, fixed as the value of plaintiff's property; and although there was some discussion in the evidence of other factors ''considered'' (R. 113)—for it was not contended by any witness that any other factors were actually ''used''—there is no other combination of figures mentioned in the evidence by which the figure determined by the Board to be the value of plaintiff's Wyoming property could have been arrived at.

Mr. McWhinnie, the member of the State Board who, according to the testimony in the case, had most to do with the fixing of the value of plaintiff's property, insisted throughout his testimony that the miles of road factor represented by the figure 3.29% was actually used (R. 110, 111, 112, 122, 124)—and in his testimony he distinguishes between the use of a factor and the mere consideration of it as a sort of check-up or verification of the result obtained. (R. 110, 111) It makes no difference what factors were ''considered'' by the Board, the only material inquiry being as to what factors were actually ''used'' by it in arriving at the disputed valuation. *Pittsburgh C. C. & St. L. Ry. Co.* v. *Backus,* 154 U. S. 421.

Mr. McWhinnie, in explaining how the figure $7,881,003.94 was arrived at says that the Board took the traffic units and use of rolling stock factors as submitted in plaintiff's return, then took as a third factor the figure 1.89, rep-

resenting a composite of gross and net revenue and proceeds: "I added the percentage of the track mileage and taking those *four* factors, the mean average of which is 2.10% of the whole property that should be allocated to Wyoming. We added the mileage, the miles of main track, to arrive at that ratio. I presented it to the Board and they agreed that they thought that was very fair and liberal with the plaintiff. It makes the amount of $7,881,004. (which in the reporter's transcript of the evidence was corrected by the witness to read $7,881,004.94, original transcript p. 224) 2.10%, the *final percentage figure.*" (R. 110).

Again, (R. 111): "We used the value of the miles of main line track in Wyoming of the plaintiff as compared to the value of the main track of the system as *one of our four factors*" and again (R. 112): "We accepted two of the factors that they (the plaintiff) presented and half of the other one, and we added one factor to balance the account as we thought fair for Wyoming."

On cross-examination, Mr. McWhinnie testified as follows (R. 124): "In our four factors we took traffic units, 1.58, as one of our four factors. * * * We also used the factor 1.64, use of rolling stock. We also used a composite of the gross and net revenue. * * * I added the fourth factor of 3.29 and then got 8.30 and divided by four and got 2.075". It should be noted here, perhaps, that although the order (R. 51) uses the language "net operating revenues 1.89%", as one of the four factors Mr. McWhinnie explained in his testimony that the words "net operating revenues" were inadvertently used and that the factor actually used was a composite of the net and gross operating revenues (R. 110) represented by the corrected figure 1.79 instead of 1.89 and with the correction of this figure the total of the four factors was 8.40 instead of 8.41 and the average of the four was 2.075 instead of 2.10 (R. 124).

It is evident from this testimony and from the findings of the trial court on the point that the Board actually used the percentage of main line miles of road as a factor in arriving at the valuation complained of.

Mr. McWhinnie, in his cross-examination, testified as to certain data considered by the members of the Board for the purpose of satisfying themselves that the figure already arrived at was a correct figure and at the request of the Court, Mr. McWhinnie prepared a tabulation which was introduced as defendants' Exhibit 7 (R. 113-117). Plaintiff's Exhibit "W", prepared by Mr. Balch and explained in his testimony on rebuttal (R. 126-133) shows conclusively that the figures appearing in Mr. McWhinnie's tabulation were not used in such a way as to clearly or even intelligently reflect the value of plaintiff's property and that when adjusted in such a way as to bear at all on the value of plaintiff's property they show such value to be more than one million dollars less than the figure fixed by the State Board.

We come now to a consideration of the evidence to show that the actual value of plaintiff's property was approximately two million dollars less than the valuation fixed by the State Board.

Most of the testimony on this point was given by Mr. C. F. Balch, now and for many years past the statistician for the plaintiff company. Mr. Balch, in his testimony explained the generally approved method and the method employed by the railroad company in this case, of arriving at the value of the company's system operating property and the method of allocating to the state a proper proportion thereof by the use of factors reflecting the extent and value of the use. The system value is arrived at by first taking a five year average of the market value of stocks and bonds from which is subtracted the value of the Company's non-operating property locally assessed. Then a five-year average of the income capitalized at 6% is taken, and added.

Dividing the sum of these two by two is done in order to secure an average and this figure is the system value (R. 52). This method has generally been approved by the courts and indicates more accurately than any other the value of the entire operating system.

The factors used to determine the proportion of the property located within the state and therefore the value of that property are the percentage of traffic units (ton-miles of freight, plus passenger miles), the percentage of rolling stock used and the percentage of operating revenues (R. 55, 56). The value of any property, of course, is determined by the extent and value of its use, and these factors more accurately than any others, determine the extent and value of the use of the company's property located within a particular jurisdiction. The percentage of traffic units within the state is 1.58, and the percentage of rolling stock is 1.65. Both these figures were submitted by the plaintiff in its tax return and accepted, as was the system value figure, by the State Board. For the gross operating revenue factor, the State Board substituted a composite of the gross and net, represented, as figured by the Board, by the figure 1.89. This figure, however, was corrected by Mr. Balch at the trial to 1.79, and the correction was agreed to by Mr. McWhinnie for the State Board (R. 124). To these three factors as already noted the State Board added the figure 3.29 representing the percentage in Wyoming of the system main line track. It was the use of this factor that the court held to be arbitrary and unlawful (R. 46).

In Exhibits "F" to "F-5" (R. 55) and in his accompanying testimony (R. 56-57) Mr. Balch shows the result of the use of the three factors (omitting track mileage) and the comparison of these factors with the train miles factor, which is sometimes used, and shows that while the average of the three factors is 1.473, the use of the train miles factor percentage is only 1.39.

Exhibit "G" (R. 58-59) shows the method by which the system value was arrived at and also the value of the Wyoming property by the use of the allocating factors already mentioned. The figures in the first column show the system value for the years from 1926 to 1930 by the use of the market value of stocks and bonds method and the average of the five years is $385,800,085.00. The assignment to the state of Wyoming on the basis of the traffic units, operating revenues and use of rolling stock factors already mentioned shows the value of the Wyoming property for the five year average to be $6,016,881. The second section of the exhibit shows exactly the same information arrived at by the use of the capitalization of income method. This shows the system value for the years to be $364,771,720.00 and the value of the Wyoming property, arrived at by the use of the three allocating factors to be $5,682,259.00. Either of these is a generally approved method but to be more accurate we have used them both with the result that the value of the Wyoming property is shown to be ($6,016,-881.00 plus $5,682,259.00 = $11,699,140.00 ÷ 2) $5,849,-570.00. This figure, arrived at by generally approved methods, represents the actual value of the company's property for the year 1931 (R. 60-61).

The testimony already discussed shows what the actual value of the company's property in Wyoming was in 1931, the figure being $5,849,570.00 as determined by methods reflecting value as distinguished from cost, value, not cost, being the basis upon which, under the Wyoming constitution and statutes, assessments are to be levied.

Plaintiff used in evidence, however, a number of tabulations and testimony relating to them to show that, even upon the basis of relative cost or the distribution of the amount of property and the percentage of the property located within the state, the value as fixed by the State Board

is grossly excessive. Two of these exhibits are "H-2" and "H-4" (R. 61-62), in each of which use is made of the appraisal made by the I. C. C. in 1917 and adjusted to December 31, 1930; these figures, it is understood of course, being based upon cost rather than value. The first exhibit shows the amount of property expressed in dollars for each of the years from 1926 to 1930, both inclusive, and shows the system average for the five years to be $639,746,926.00 and the Wyoming average to be $11,767,752.00, the latter figure being 1.84% of the former. The table shows that in 1930, 1.75% of the amount of plaintiff's operating property was located within the state of Wyoming; the system value as already shown and not disputed in this case was $375,285,902.00 and only 1.84% of the property representing that value was located within the state.

Exhibit "I" (R. 63, 64) shows the earnings per mile of road in each state, the freight traffic density, the passenger density, the two combined, and then the amount of rolling stock per mile of road—all relating to the year 1930 only. The operating revenue runs from $44,932.00 per mile in Illinois to $6,844.00 per mile in Wyoming, the average of the entire line being $15,373.00 per mile and of the entire line outside Wyoming $15,663.00 per mile. So that the earnings per mile in Wyoming were only 44.52% of the average earnings per mile of the entire line; in other words, a mile of road in Wyoming earned 44.52% of the average system mile. To put it another way, it required 2.25 miles of road in Wyoming to earn as much as one average system mile; and it required 2.29 miles of road in Wyoming to earn as much as one average mile of road in the other eight states.

By the same computation on the basis of freight traffic units the system average was 895,012 tons per mile of road, while the average in Wyoming was only 420,687 tons, and for the entire system, excluding Wyoming, 911,152, so that

the average mile of road in Wyoming handled only 48.12% as much traffic as the average system mile.

The average passenger units throughout the system for the year 1930 was 98,411; in Wyoming it was 6,673. The average for the whole road, excluding Wyoming was 101,-532. So that the average Wyoming mile carried only 6.77% of the average system mile. In other words, it required 14.75 miles of road in Wyoming to carry as many passengers one mile as were carried by the average system mile of road.

The average of the combined freight and passenger traffic units per mile was 993,423 and in Wyoming it was 427,360, the latter figure being only 43.02% of the former; in other words, it required 2.325 miles of road in Wyoming to handle as many traffic units as the average system mile.

The average rolling stock used for the entire line per mile of road was 15,107, while in Wyoming it was only 7,060, the latter figure being 46.73% of the former (R. 63-64).

The application of these figures is shown in Exhibit "J-1" (R. 64-65). On the basis of these figures the average mile of road in Wyoming should be worth only $19,858.00 as compared with the average system mile of $44,368.00 and the total of the 278.35 miles should be only $5,527,-474.00, which is $2,353,924.94 less than the valuation as fixed by the State Board.

On a five year average (Exhibit "J-1" covering only the year 1930) upon a consideration of the same characteristics the average Wyoming mile is shown to be worth only $21,-024.00 and the entire Wyoming miles only $5,852,030.00 which is $2,028,973.00 less than the valuation fixed by the State Board. (R. 65.)

Since, as already suggested, the value of property is to be determined by the value of its use, it is evident from the data shown in Exhibits "I" and "J-1" that the average

Wyoming mile, measured by the value and extent of its use, is worth substantially less than 50% of the average system mile, from which it necessarily follows that the use by the State Board of the figure 3.29, representing the percentage of main track mileage within the state does not even approximately reflect the actual value of the plaintiff's Wyoming property.

Transportation train miles is used by some of the railroads in some states as an allocating factor, and, with the view of showing that its non-use by the plaintiff did not result to the disadvantage of the defendants, plaintiff introduced in evidence plaintiff's Exhibit "K" (R. 66) from which it appears that in the year 1930 the use of the transportation train miles factor would have produced in Wyoming the figure 1.39% while over the five year period it would have produced 1.51%, both of which are considerably less than the figures representing the factors actually used.

Exhibit "L" (R. 68, 69) shows the ratios of performance or use of the company's property in the various states as compared with the same in Wyoming. To illustrate, 9.78% of the system miles of road are within the state of Illinois while 3.29% are in Wyoming. Notwithstanding the fact that the number of miles operated in Illinois is only about three times the number operated in Wyoming, 29.03% of all the traffic of the system is carried within the state of Illinois while only 1.42% is carried in Wyoming. The figures as to the other states are shown on the exhibit and demonstrate that, measured by the three factors, plaintiff's property in all the important states is worth much more per mile than the Wyoming property.

Plaintiff introduced Exhibit "M-6" (R. 70) relating to freight traffic statistics. This exhibit shows that the tons per mile of road originating in Wyoming is 17.95% less

than on the average system mile, that the tons received from connecting carriers is 81.27% less than on the average system mile and that the total tons carried is 40.52% less than the average system mile. (R. 70-72).

Plaintiff's Exhibit "P-1" shows that in 1930 the net system railway operating income was only 66.49% of that of 1929 and in 1931 it fell to 23.92%. In 1931 the total net operating income of the company throughout its system was only $6,272,136.00, while the fixed interest and funded debt charges for that year were $16,178,907.00 (R. 72).

Plaintiff's Exhibit "Q-1" shows that the market value of the company's securities from January to November, 1931, decreased $197,757,159.00. (R. 72)

The data contained in these two exhibits are very significant in view of the fact that during the three year period the valuation fixed by the State Board upon the company's Wyoming property was only slightly reduced. In three years the very substantial net operating income of 1929 had largely disappeared and in 1931 there was a deficit of approximately ten million dollars. In the same period of time there was a drop of almost two hundred million dollars in the market value of the company's securities. These figures reflect a vast depreciation in value which was entirely ignored by the State Board in its conclusions.

Exhibits "R-1, R-3, R-5, R-7, R-9, R-11, R-13, R-15, R-17 and R-18" (R. 72-75) constitute a statement of the appraisal made of the company's operating properties by the I. C. C. under the Valuation Act of 1913 (49 U. S. C. A. 19a), based on the cost as of June 30, 1917, plus the net additions to December 31, 1930. The system appraisal as of December 31, 1930 was $669,198,216.00. The appraisal of the property located in Wyoming was $11,724,126.00, including a proper allocation of equipment. The property

located in Wyoming was 1.75% of the whole. The Wyoming property was appraised at $42,120.00 per mile, while the entire property was appraised at $79,813.00 per mile. In other words on the cost basis used by the I. C. C. the average Wyoming mile of road is worth only 52.77% of the average system mile. Taking 52.77% of 3.29% (the latter figure representing the percentage of the system main line miles located in Wyoming) we have 1.736 as representing the percentage of the system value located in Wyoming on the basis of the I. C. C. appraisal.

If the I. C. C. appraisal figures are to be used at all, since they do not represent value but are based upon the cost, or in other words, the amount of property measured in dollars, and since the criterion of tax valuation under the Wyoming Constitution and Statutes is actual value rather than cost, the I. C. C. figures to be of any assistance whatever must take into account the difference between the amount of property in, or the cost of the average Wyoming mile, and the amount of property or cost of the average system mile.

The operation just referred to produces the figure 1.736 as representing the percentage of the system value located in Wyoming on this basis. If to the factors 1.58, 1.65 and 1.79 there is added the correct factor on the I. C. C. appraisal of 1.736 and the sum of these factors is divided by four the average produced is 1.689% which, applied to the system value of $375,285,903.00 produces a figure of $6,338,578.88, representing on this basis the value of the company's Wyoming property, which figure is $1,542,425.06 less than the value as fixed by the State Board.

Exhibit "R-11" shows the system value of the company's operating properties to be 60.3% of the I. C. C. appraisal, and Exhibit "R-13" contains the same information applied to the state of Wyoming, showing the

value of the Wyoming property to be only 56.08% of the I. C. C. appraisal.

Exhibits "R-15", "R-17" and "R-18" show that on the basis of earning power and with relation to the I. C. C. appraisal, the value of the company's property in Wyoming is 1.47% of that of the entire line which is less than the value as figured by the company by the use of the three factors already discussed.

Using the figure 1.47 as the fourth factor with the other factors 1.58, 1.65 and 1.79 and dividing the sum by four produces an average ratio of 1.622 which applied to the system value of $375,285,903.00 indicates the value of the Wyoming property on this basis to be $6,087,137.33 which is $1,793,866.62 less than the value as fixed by the State Board.

The plaintiff introduced in evidence its Exhibits "V", "V-1" and "Y" (R. 75, 76, 84 to 99), the former containing a detailed statement of the characteristics of the physical property throughout the system and the latter being a transcript of the evidence submitted by the plaintiff at the hearing before the State Board of Equalization and containing the information presented in Exhibits "V" and "V-1". These exhibits were introduced not only to show the vast inferiority of the Wyoming property with reference to quantity, quality and cost as compared with the property throughout the other states, which is given in the testimony of Mr. Lorch to which reference will be made, but to show that all the information presented at the trial was presented to the State Board at the hearing. All this information was furnished each year during the five year period ending in 1931 to the State Board of Equalization.

The evidence to which we have called the Court's attention—and none of it was controverted by the defendants' witnesses—demonstrates conclusively that whatever test

of value may be applied, whether the extent and value of the use of the property, however the same may be figured, or by the comparison of the amount of property located within the state of Wyoming with that located in all the states—the value of the average mile of property in Wyoming does not exceed approximately 50% of the value of the average system mile and that the valuation of $7,881,003.94 as fixed by the State Board is approximately two million dollars in excess of the actual value of the Wyoming property.

We invite the Court's attention now briefly to the testimony of Mr. J. A. Lorch, with reference to plaintiff's Exhibit "S" relating to the I. C. C. appraisal of 1917 and the adjustments to December 31, 1930, appearing in plaintiff's Exhibits "S" and "T-1" and to the schedules appearing in plaintiff's Exhibit "U" to "U-9" both inclusive, (R. 87-99) showing the quantity, quality and physical characteristics of plaintiff's operating property located in each of the several states, including Wyoming. These schedules were prepared by Mr. Lorch, plaintiff's valuation engineer, who co-operated with the I. C. C. in a detailed examination of all plaintiff's property, which examination resulted in the appraisal mentioned, and who is familiar from personal examination with every part of the property of the plaintiff in all the states. Even a casual examination of the exhibits mentioned discloses the fact that while in such states as Illinois, Wisconsin, etc., the company has miles upon miles of multiple tracks, grade separations, very expensive terminal depots and freight terminals, repair shops, docks, block system, heavy rails, expensive grades, etc., there are in Wyoming no block system, no double tracks, no grade separations, no expensive passenger or freight depots, no elevated tracks, no expensive bridges, and that its rails by comparison are very

light and the construction of its single track very inferior, all due to the fact that the Wyoming property is at the end of the line and traverses a very sparsely settled country.

All this testimony cannot fail to show, as the trial court found the fact to be, that the use by the State Board of the percentage of miles-of-road factor without taking any account whatever of the vast difference between the Wyoming mile and the average mile in the quantity, quality, cost, characteristics or value of the property was a wholly arbitrary and unlawful method, having no essential relation whatever to the value of the property affected.

We have gone into some detail in this because of petitioners' repeated assertions that this case is at most merely one of a mistake in valuation or one of mere erroneous assessment. The conduct of the Board was more than this. It was a deliberate, intentional disregard of uncontroverted facts, showing that a mile of plaintiff's road in Wyoming is wholly different from an average mile of its system. It was that complete disregard of uncontroverted facts, clearly before the Board, that made its use of the mileage factor an arbitrary and unreasonable action, amounting, as the Circuit Court of Appeals said, to a "fraud in law". (R. 157)

Before leaving the discussion of the evidence attention should be called to the tax returns as made to the State Board from year to year, up to the year in controversy. As explained in the testimony of Mr. Miller (R. 101-107) the returns were made upon blanks prepared and supplied to the company by the State Board. These blanks were so arranged as to call for the value of each of a great many individual items of property which could be furnished only upon the basis of the I. C. C. appraisal figures. So that, for example, defendants' Exhibit "1" (R. 102-103) shows

the grand total valuation of the company's Wyoming property to be $8,281,950.00. The petitioners insist in their briefs that this figure was represented by the company to be the actual value of its Wyoming property. Such is not the case, however. There was attached to the summary sheet of each of the returns from year to year, including the last, a memorandum, a copy of which appears in the record at pages 103-104, explaining that the figures appearing in the return were arrived at on a cost basis without reference to actual value and that the actual value of the property for the year 1931, for example, did not exceed the sum of $5,849,570.00. This identical memorandum was attached to the plaintiff's return introduced in evidence in the case of *C. & N. W. Ry. Co.* v. *Eveland,* 13 Fed. (2nd.) 442, 446, and was accepted by the court in that case as the company's representation of the value of its property, as was done by the trial court in the case at bar. There can be no question, of course, that the valuation claimed by the company in its tax return for 1931 was the last-named figure rather than the figure $8,281,950.00. Presumably the purpose to be served by the detailed forms required by the State was to determine the relative portions of the total assessment to be apportioned to each of the counties, and thus do justice as among them. Having the cost appraisal of individual items of property might be helpful in such an allocation only.

Points, Authorities and Discussion.

The petitioners contend that the findings of fact, conclusions of law and decree of the Court are contrary to the law and the evidence, that the Court was without jurisdiction, and that respondent had an adequate remedy at law.

The following is a statement of the principles of law, as we understand them, governing the case, with list of authorities and discussion of the same.

1. JURISDICTION—MULTIPLICITY OF SUITS.

The necessary diversity of citizenship and amount involved existing, the Federal Court had jurisdiction in equity because the legal remedy involved a multiplicity of actions.

High on Injunctions, 4th Ed., Sec. 12, p. 18.
Wilson, Collector, v. *Ill. S. Ry. Co.,* 263 U. S. 574.
M. & O. R. Co. v. *Schnipper,* 31 F. (2d) 587 (Dist. Ct. E. D. Ill.).
Greene v. *L. I. R. Co.,* 244 U. S. 499.
U. P. Ry. Co. v. *Board of Commissioners, Weld County,* 247 U. S. 282.
Matthews v. *Rodgers,* 284 U. S. 521, 76 L. Ed. 447.
Stratton v. *St. L. S. W. Ry. Co.,* 284 U. S. 530.
Raymond v. *Chicago Union Traction Co.,* 207 U. S. 20, 38, 40.
Hill v. *Wallace,* 259 U. S. 44
Lee v. *Bickell,* 292 U. S. 415, 78 L. Ed. 895, 898, 54 S. Ct. 727.
Carroll v. *Safford,* 3 How. 441.
Parker v. *Winnipiseogee Lake Cotton Co.,* 2 Black 545.
Oelrichs v. *Spain,* 15 Wall. 211.
Cruickshank v. *Bidwell,* 176 U. S. 73.
Detroit v. *Detroit C. S. Ry. Co.,* 184 U. S. 368.
Cleveland v. *Cleveland City Ry. Co.,* 194 U. S. 517.

All the authorities recognize that the necessity for the prevention of a multiplicity of suits is a favorite and much used ground for the exercise of equitable jurisdiction by the Federal Courts and that multiplicity of suits means more than one legal action.

High, in his work on Injunctions (Fourth Edition, Section 12, p. 18) says:

"The prevention of vexatious litigation and of a

> multiplicity of suits constitutes a favorite ground for the exercise of the jurisdiction of equity by way of injunction; and it may be laid down as a general rule that whenever the rights of a party aggrieved cannot be protected or enforced in the ordinary course of proceedings at law, except by numerous and expensive suits, a court of equity may properly interpose and afford relief by injunction."

Wilson, County Collector, et al. v. *Illinois Southern Ry. Co.*, 263 U. S. 574, was a case in which the plaintiff railway company sued the five county collectors of that many counties in the United States District Court of the Eastern District of Illinois, seeking to enjoin the collection of taxes alleged to have been illegally assessed by overvaluing plaintiff's property and undervaluing property of other taxpayers. Plaintiff claimed that the action of the assessing bodies operated to deprive it of its property without due process of law and also to deprive it of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States. The defendants rested their case on a motion to dismiss for want of equity, contending that there was an adequate remedy at law and that the Court was without jurisdiction to grant equitable relief.

The Court overruled the contention of the defendants, holding that the plaintiff had no adequate remedy at law, particularly because of the fact that the situation of the plaintiff required relief against five separate defendants in five different counties, and held that the District Court had jurisdiction to grant the injunction sought. The Court, through Mr. Justice Holmes, said (575-577):

> "This is a bill in equity to restrain the collection of taxes for the years 1917, 1918, 1919, and 1920, upon the track and rolling stock then belonging to the Illinois Southern Railway Company. It alleges that the property was erroneously and fraudulently overvalued, out of all proportion to the other taxable property in the

state, and invokes the jurisdiction of the district court on the ground that the 14th Amendment of the Constitution is infringed. It alleges further that the sums that properly could have been charged have been paid; that if the additional amounts demanded could be recovered at all after payment, it would be only by a multiplicity of suits against the taxing bodies of the several counties where the collections are made. It is argued that, in any proceeding at law in these counties, it would be impossible to secure a uniform or any adequate readjustment of the total valuation, which is made by a state board, and so that equity only can afford adequate relief. The bill prays that the defendants, who are the collectors for five counties, may be restrained from applying to their respective county courts for judgments under the summary proceedings provided by statute for the collection of taxes on real estate (Cahill Ill. Stat. 1923, chap. 120, Sec. 191), and that the court will determine the amounts, if any, remaining equitably due and unpaid. The defendants ultimately relied upon a motion to dismiss for want of equity. The district court granted an injunction as prayed, and the case is here on the single question whether the plaintiffs had an adequate remedy at law. * * *

"The appellants rely mainly upon *Keokuk & H. Bridge Co.* v. *Salm*, 258 U. S. 122, 66 L. Ed. 496, 42 Sup. Ct. Rep. 207. In that case a bill charging fraudulent overvaluation was dismissed, and the dismissal was affirmed by this court on two grounds: that there was an adequate remedy at law and that the plaintiff had not tendered or offered to pay the amount confessedly due. The latter ground is absent here. As to the former, it seems to us that the present case is to be distinguished. *Keokuk & H. Bridge Co.* v. *Salm* arose upon an assessment of real estate by county assessors in a single county, as to which the remedies available were pointed out. Here the assessment was of property in five counties, by the state board of equalization for 1917 and 1918, and by its successor, the state tax commission, for the two later years. Assuming that in each of the counties before the tax could be collected a judgment must be obtained in the county court in a civil suit, and that in such suits the defendants, the

present plaintiffs, could set up the facts here relied upon, as in the Keokuk & H. Bridge Co.'s case, not only would those suits be many, but there would be insuperable difficulty in determining what the proper assessment against the whole road should be, and in apportioning the due share to the county concerned. This difficulty would recur in each of the five counties, with not improbably different results in each. It seems to us that the right of full defense in those suits, if it exists, is not an adequate remedy at law. *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20, 38-40, 52 L. Ed. 78, 88, 89, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757; *Kirby* v. *Lake Shore & M. S. R. Co.*, 120 U. S. 130, 134, 30 L. Ed. 569, 571, 7 Sup. Ct. Rep. 430."

It will be noted that under Section 89-4203, Wyoming Revised Statutes 1931, not only would the plaintiff of necessity be put to four law actions, that is, one against each of the four County Treasurers, to recover back excessive taxes paid, but it would probably be put to the necessity of prosecuting as many actions at law as there are municipalities and school districts in the four counties, because the statute provides that if the taxes paid to the County Treasurer have been by him disbursed to the municipalities within the county, the actions to recover the taxes must then be brought against the municipalities.

The case of *M. & O. R. Co.* v. *Schnipper*, 31 Fed. (2d) 587 (Dist. Ct. E. D. Ill.), was one in which the plaintiff railway company sought to enjoin several defendant county collectors from the collection of taxes alleged to be excessive because of the overvaluation of plaintiff's property and the undervaluation of other property. The Court (593) held that the plaintiff pursued the proper remedy and that the Court had jurisdiction to grant injunctive relief, citing *Wilson* v. *Illinois Southern Ry. Co.*, 263 U. S. 574, 44 S. Ct. 203, 68 L. Ed. 456; *Hanover Fire Insurance Co.* v. *Harding*, 272 U. S. 494, 47 S. Ct. 179, 71 L. Ed. 372, 49 A. L. R. 713; *Sioux City Bridge Co.* v. *Dakota County, Nebraska*, 260 U.

S. 441, 43 S. Ct. 190, 67 L. Ed. 340, 28 A. L. R. 979; *Greene* v. *L. & I. R. R. Co.*, 244 U. S. 499, 37 S. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88; *Munn* v. *Des Moines National Bank*, 18 F. (2nd) 269 (C. C. A. 8); *Raymond* v. *Chicago Union Traction Co.*, (297) 207 U. S. 20, 28 S. Ct. 7, 52 L. Ed. 78, 12 Ann. Cas. 757; *Cummings* v. *National Bank*, 101 U. S. 153, 25 L. Ed. 903.

The case of *Greene* v. *Louisville & I. R. Co.*, 244 U. S. 499, presents a situation, so far as the questions of jurisdiction and the propriety of injunctive relief are concerned, almost identical with the case at bar. The plaintiff sought an injunction to restrain the levying of alleged excessive taxes growing out of a discriminatory undervaluation of the property of other taxpayers.

The bill of complaint alleged that the State Board of Valuation and Assessment unless restrained would certify to the county clerks of three counties the alleged excessive amounts claimed to be due said counties by reason of the alleged excessive valuation fixed by the Board; that the county clerks would thereupon certify said assessments to the tax collectors of the counties; that the tax collectors would proceed to make collections and institute unwarranted suits against the plaintiff; that the attorney general would institute civil and penal actions against the plaintiff based upon its supposed delinquency in the payment of taxes; and that the unauthorized and illegal valuation constitutes a cloud on plaintiff's title and a lien upon its property which unless restrained the officers would proceed to enforce by foreclosure.

The Court held that the facts stated entitled the plaintiff to injunctive relief and that there was no adequate legal remedy.

It will be noted by reference to paragraph 15 of plaintiff's bill of complaint (R. 6) in the case at bar that the al-

legations contained in plaintiff's bill are substantially and almost exactly the same as those contained in the bill in the reported case; and it will be noted by reference to paragraph 15 of the defendants' answer (R. 21, 22) that all the allegations contained in plaintiff's paragraph 15, except those as to the excessiveness of the values and taxes, are admitted.

The case of *Hill* v. *Wallace,* 259 U. S. 44, attacked the validity of the Future Trading Act of August 24, 1921, C. 86, 42 Stat. 187, by a suit for injunction in which it was contended that the issuance of an injunction would be in violation of Section 3224, Rev. Stat., 26 U. S. C. A. 154. The Court held, however, that where there were exceptional circumstances, such as multiplicity of suits, the statute referred to does not forbid the issuance of an injunction. On this point the Court said (62):

> "A further question arises as to whether this is a suit for an injunction against the collection of the tax, in violation of Sec. 3224, Rev. Stat. Sec. 5947, 3 Fed. Stat. Anno. 2d. ed. p. 1032, in so far as it seeks relief against the District Attorney and Collector of Internal Revenue. Were this a state act, injunction would certainly issue against such officers, under the decisions in *Ex parte Young,* 209 U. S. 123, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; *Ohio Tax Cases,* 232 U. S. 576, 587, 58 L. Ed. 737, 743, 34 Sup. Ct. Rep. 372; *McFarland* v. *American Sugar Ref. Co.* 241 U. S. 79, 82, 60 L. Ed. 899, 902, 36 Sup. Ct. Rep. 498. Does Sec. 3224, Rev. Stat., prevent the application of similar principles to a Federal taxing act? It has been held by this court, in *Dodge* v. *Brady,* 240 U. S. 122, 126, 60 L. Ed. 560, 562, 36 Sup. Ct. Rep. 277, that Sec. 3224 of the Revised Statutes does not prevent an injunction in a case apparently within its terms in which some extraordinary and entirely exceptional circumstances make its provisions inapplicable. See also *Dodge* v. *Osborn,* 240 U. S. 118, 122, 60 L. Ed. 557, 560, 36 Sup. Ct. Rep. 275. In the case before us, a sale of grain for future delivery

> without paying the tax will subject one to heavy criminal penalties. To pay the heavy tax on each of many daily transactions which occur in the ordinary business of a member of the exchange, and then sue to recover it back, would necessitate a multiplicity of suits, and, indeed, would be impracticable. For the Board of Trade to refuse to apply for designation as a contract market, in order to test the validity of the act, would stop its 1,600 members in a branch of their business most important to themselves and to the country. We think these exceptional and extraordinary circumstances with respect to the operation of this act make Sec. 3224 inapplicable."

In the case of *Lee* v. *Bickell,* 292 U. S. 415, 78 L. Ed. 895, 54 S. Ct. 727, decided within the past year, in which it appeared that the plaintiff sued in the Federal Court for an injunction, without which he would have been put to a multiplicity of actions at law, the Court said (421):

> "Upon these facts the District Court held that the complainants, who were non-residents of Florida, were without an adequate remedy at law, and that the threatened acts of the Comptroller, if illegal, should be restrained by a court of equity. As to this we are not in doubt, the multiplicity of actions necessary for redress at law being sufficient, without reference to other considerations, to uphold the remedy by injunction. *Wilson* v. *Illinois Southern R. Co.* 263 U. S. 574, 68 L. Ed. 456, 44 S. Ct. 203; *Hill* v. *Wallace,* 259 U. S. 44, 62, 66 L. Ed. 822, 827, 42 S. Ct. 453. The taxes claimed by the Comptroller and resisted by the complainants exceed the amount necessary to sustain the federal jurisdiction. Several hundred transactions are affected every day."

The authorities to which particular reference has been made are quite sufficient without further citations to show that the avoidance of a multiplicity of suits is one of the exceptional circumstances warranting the exercise of equity jurisdiction; and the pleadings and evidence in the case at bar make it clear that the remedy at law available to re-

spondent would have required the bringing of at least four law actions, one against each of the County Treasurers, and as many more as there were municipalities within the several counties to which the taxes that might have been paid by the railroad company had been distributed at the time the law actions were instituted.

There is nothing in *Matthews* v. *Rodgers*, 284 U. S. 521, or *Stratton* v. *St. L.-S. W. Ry. Co.*, 284 U. S. 530, which is inconsistent with the contentions we are urging. The privilege tax complained of in *Matthews* v. *Rodgers* was one applicable separately to a number of different individuals. Each individual had one case differing from each other individual's case, in that the alleged unconstitutionality of the statute depended upon the application of the statute to each of the plaintiffs and its effect upon his business, which was alleged to be interstate commerce. Thus, there were separate issues of law and fact as to each plaintiff, the nature of his business, and the manner and extent to which the tax imposed a burden on interstate commerce. In that way there were presented separate issues of fact and law. In the controversy at bar the situation is different. There is an identity of issues, both of fact and law, which can be determined in one equitable proceeding. At least four divergent actions at law would be required, with possible divergence of conclusions. There was no multiplicity of suits present in the true sense in the situation before the court in *Matthews* v. *Rodgers*, while the case at bar is a typical instance of avoidance of multiplicity of suits, as that term has long been known to equity jurisprudence. The *Stratton case*, unlike that at bar, did not involve multiplicity of suits at all.

2. Inadequacy of Legal Remedy.

The legal remedy, to oust equity of jurisdiction, must be as complete, practicable, certain, efficient and adequate to the administration of justice as the remedy in equity.

Boyce v. *Grundy,* 3 Pet. 210, 215, 217.
Lewis v. *Cocks,* 23 Wall. 466.
Sullivan v. *Portland, etc., R. Co.,* 94 U. S. 806.
Walla Walla v. *Walla Walla Water Co.,* 172 U. S. 1.
Boise Art. H. & C. Water Co. v. *City of Boise,* 213 U. S. 276.
U. P. Ry. Co. v. *Board of County Commissioners of Weld County,* 247 U. S. 282.
Dawson v. *Kentucky Dist. & Whse. Co.,* 255 U. S. 288.
Springfield Milling Co. v. *Barnard & Leas Mfg. Co.,* 81 Fed. 261, 265, 26 C. C. A. 389-393.
Brown v. *Arnold,* 131 Fed. 723, 67 C. C. A. 125.
Kilbourn v. *Sunderland,* 130 U. S. 514.
Gormley v. *Clark,* 134 U. S. 338.
McConihay v. *Wright,* 121 U. S. 206.
A. T. & S. F. Ry. Co. v. *Sullivan,* 173 Fed. 456, 470.
Williams v. *Neely,* 134 Fed. 1, 10, 67 C. C. A. 171, 180.
Davis v. *Wakelee,* 156 U. S. 680.

It is, of course, the universally accepted rule that the legal remedy sufficient to deprive a suitor of the right to come into equity must be adequate.

In *Boyce's Executors* v. *Grundy,* 3 Peters 210, 215, 217, the general doctrine is thus stated by this Court, at p. 215:

> "It is not enough that there is a remedy at law; it must be plain and adequate, or in other words, as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity."

In *Lewis* v. *Cocks,* 23 Wall. 466, it is said (470):

> "To bar equitable relief, the legal remedy must be equally effectual with the equitable remedy, as to all the rights of the complainant. Where the remedy at law is not 'as practical and efficient to the ends of justice and its prompt administration,' the aid of equity may be invoked * * *."

The language of this Court in *Sullivan* v. *Portland and Kennebec R. R. Co.,* 94 U. S. 806, is as follows (811):

> "The objection that there is a remedy at law is only available where such remedy is as plain, adequate and effectual as the remedy in equity."

In *Boise Artesian Hot & Cold Water Co.* v. *Boise City,* 213 U. S. 276, this Court said (281):

> "* * * it must not be forgotten that the legal remedy must be as complete, practicable and efficient as that which equity could afford."

In *Union Pacific Railway Co.* v. *Weld County,* 247 U. S. 282, the plaintiff sought to enjoin the collection of taxes claimed to be illegal, upon the ground that resort to equity was necessary to avoid a multiplicity of actions at law. The statute of the State of Colorado, as originally enacted, authorized the taxpayer to pay under protest taxes claimed to be illegal and to file a law action against the county to recover the same. There was an amendment to the statute which left in doubt the question as to whether plaintiff could recover from the county all the taxes which he was entitled to recover, or, on the other hand, it would be necessary to maintain a separate action against each of the municipalities to which distribution might have been made by the County Treasurer. The Court held that the effect of the law being uncertain, the aggrieved taxpayer could not be required to speculate upon his remedy, and said (285):

> "Whether the section named is still in force, unqualified and unmodified, is the important question. If not in force, a single action at law would not suffice, for

then it would be necessary to bring a separate action against each of several school districts and towns for its part of the tax. See *Raymond* v. *Chicago Union Traction Co.* 207 U. S. 20, 39, 40, 52 L. Ed. 88, 89, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757. And if the section has been so qualified and modified that the continued existence of the right originally conferred on the taxpayer is involved in uncertainty, an essential element of the requisite remedy at law is wanting; for, as this court has said: 'It is a settled principle of equity jurisprudence that, if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit. * * * Where equity can give relief, plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law.' *Davis* v. *Wakelee,* 156 U. S. 680, 688, 39 L. Ed. 578, 584, 15 Sup. Ct. Rep. 555."

And again (287):

"In these circumstances it cannot be said that the company certainly or plainly has an adequate and complete remedy at law. On the contrary, the existence of such a remedy is debatable and uncertain. And this being so, the situation is not one in which cognizance of the present suit properly can be declined.

"* * * Such questions are rarely, if ever, regarded as properly subject to examination here on writ of certiorari."

In *A. T. & S. F. Ry. Co.* v. *Sullivan,* 173 Fed. 456, the question as to whether there was an adequate remedy at law and as to the jurisdiction of the Federal Court to grant an injunction against the collection of taxes claimed to have been illegal because based upon discriminatory valuation was raised by the defendant. The suit was brought in the U. S. District Court against several county treasurers in Colorado. The Court held that even though the plaintiff might pay the taxes alleged to have been illegal and sue the several defendant county treasurers to recover the money, that was not an adequate remedy, and held further that the remedy at law in order to preclude complainant from suing

in equity must be "as certain, complete, prompt and efficient to attain the ends of justice as the remedy in equity." On this point the Court said (470):

> "Counsel cite the statute of Colorado, which provides that the board of county commissioners shall refund all taxes paid by any person which are afterwards found to be erroneous or illegal (Laws of Colo. 1902 (Ex. Sess.) p. 146, c. 3, Sec. 202), and contend that the complainant has an adequate remedy by an action at law based upon this statute. Conceding, without deciding, that it might maintain such an action to recover back the illegal portion of the tax against its property, is that remedy as adequate as the injunction of the court below? The adequate remedy at law which will deprive a court of equity of jurisdiction is a remedy as certain, complete, prompt, and efficient to attain the ends of justice as the remedy in equity. *Williams* v. *Neely*, 134 Fed. 1, 10, 67 C. C. A. 171, 180, 69 L. R. A. 232; *Boyce* v. *Grundy*, 3 Pet. 210, 215, 217, 7 L. Ed. 655; *Springfield Milling Co.* v. *Barnard & Leas Mfg. Co.*, 81 Fed. 261, 265, 26 C. C. A. 389, 393; *Brown* v. *Arnold*, 131 Fed. 723, 67 C. C. A. 125. The facts and the law of this case have been ably presented to and carefully considered by two courts, and all the material issues in it have been determined. The complainant now has and it is entitled to keep the $3,580 requisite to pay the illegal portion of its tax. An injunction in this suit will enable it to retain it, and will end this controversy here. In order to obtain any adequate relief at law, it must pay over this $3,580 to the defendant, must bring, try, and prosecute to judgment an action at law against the county to recover it back, must possibly, it may be probably, come again to this court for review of that trial, and then possibly, perhaps probably, prosecute a petition for a mandamus to compel the levy of taxes to pay the judgment it shall recover, and after all this it will never secure more than a part of the actual expenses it will necessarily incur in prosecuting its action at law. This proposed remedy is neither as prompt, nor as certain, nor as complete, as the relief which may be granted through this suit in equity."

3. Remedy Must Be in Federal Court.

The law remedy to defeat Federal equity jurisdiction must be available in the Federal Court.

Smyth v. *Ames,* 169 U. S. 466, 516.
Henrietta Mills v. *Rutherford,* 281 U. S. 121.
Risty v. *C. R. I. & P. Ry. Co.,* 270 U. S. 378.
C. B. & Q. R. Co. v. *Osborne,* 265 U. S. 14.
Dawson v. *Ky. Distilleries & Whse. Co.,* 255 U. S. 288.
C. & N. W. Ry. Co. v. *Bauman,* 69 F. (2nd) 171, 176 (certiorari denied, *Bauman* v. *C. & N. W. Ry.,* ..... U. S. ....., 54 S. Ct. 641).

The rule is of universal application that a remedy at law sufficient to oust equity Federal Courts of jurisdiction must be a remedy in the Federal Courts.

In *Smyth* v. *Ames, supra,* it was contended that a state statute authorizing the institution of a suit in the state court to determine the reasonableness of rates fixed by the state commission constituted an adequate remedy and that the complainant could not resort to the Federal Court without testing his rights under the state statute in the courts of the state. Holding that the remedy under the state statute was not adequate, the Court said (466, 516):

> "The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a Federal court is not to be conclusively determined by the statutes of the particular state in which suit may be brought. One who is entitled to sue in the Federal circuit court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action. * * *
>
> * * * * *

> A party by going into a national court does not, this court has said, lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality; that the wise policy of the Constitution gives him a choice of tribunals. *Davis* v. *Gray*, 83 U. S. 16 Wall. 203, 221; *Cowley* v. *Northern Pacific Railroad Co.* 159 U. S. 569, 583."

Dealing with the rule under discussion, Mr. Justice Stone, speaking for the Court, in *Risty* v. *Chicago, Rock Island & Pacific Ry. Co.*, 270 U. S. 378, said (388):

> "As the principal ground for appellees' suits was the invalidity of the whole proceeding and not merely inequality in apportionment of benefits, and as the effect of the proposed equalization would have been to bring the lands of appellees into the newly established drainage district and subject them to future assessments for construction costs and for maintenance, the threatened injury was imminent and the suits were not premature. The assessment, if made, would have established a lien on the appellees' property which would be a cloud on title, to say nothing of the fact that the effect of the pending proceeding would have been to subject their property to future assessments; hence, the case was one for equitable relief unless there was a plain and adequate remedy at law. • • • The remedy by appeal to the state court under Sec. 8469 does not appear to be coextensive with the relief which equity may give. In any event, it is not one which may be availed of at law in the Federal courts, and the test of equity jurisdiction in a Federal court is the inadequacy of the remedy on the law side of that court and not the inadequacy of the remedies afforded by the state courts. *Smyth* v. *Ames*, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. Rep. 418; *Chicago, B. & Q. R. Co.* v. *Osborne, supra.*"

The Circuit Court of Appeals, Eighth Circuit, in the case of *Chicago & North Western Railway Co.* v. *Bauman*, 69 Fed. (2d) 171, decided February 13th of the present year, holding that a statute authorizing the recovery in a state court of illegal taxes paid under protest does not constitute an adequate remedy, uses the following language (176):

> "The adequacy of a remedy at law is not conclu-

sively determined by the statutes of a state, nor by permission to sue at law in a state court on the same cause of action. One entitled to sue in a Federal court is entitled to invoke its jurisdiction."

This Court denied certiorari April 9, 1934. *Bauman* v. *C. & N. W. Ry. Co.*, ... U. S. ....., 54 S. Ct. 641.

The rule under consideration is recognized in all the Federal Courts and requires no further discussion.

4. Remedy Under Wyoming Revised Statutes, 115-311 and 89-4201-4203, Inadequate.

Neither the remedy provided by Wyoming Revised Statutes 115-311 authorizing the county board to refund illegal taxes paid nor the remedy provided by Wyoming Revised Statutes 89-4201-4203 is adequate, because (a) each of such remedies necessarily involves a multiplicity of suits and (b) there is no statutory provision for the payment of interest on taxes authorized to be refunded.

Wyoming Revised Statutes, 115-311.
Wyoming Revised Statutes, 89-4201-4203.
Wyoming Revised Statutes, 30-1103.
Wyoming Revised Statutes, 30-1113.
Wyoming Revised Statutes, 115-308.
Wyoming Revised Statutes, 115-1005-1006.
Hopkins v. *Southern California Tel. Co.* 275 U. S. 393.
Raymond v. *Chicago Union Traction Co.* 207 U. S. 20.
Smith v. *Reeves,* 178 U. S. 436.
Proctor & Gamble Dist. Co. v. *Sherman,* 2 Fed. (2nd) 165, 166.
Nutt v. *Ellerbe,* 56 Fed. (2nd) 1058, 1062.

(a) *Each such remedy involves multiplicity of suits.*

It is contended by petitioners that the statutes mentioned afford complainant an adequate remedy.

Section 115-311 of the Wyoming Revised Statutes provides as follows:

> "In all cases where any person shall pay any tax, or any portion thereof, that shall thereafter be found to be erroneous or illegal, whether the same be owing to clerical errors or other errors, the board of county commissioners shall direct the treasurer to refund the same to the taxpayer * * *".

Section 89-4201 of the Wyoming Revised Statutes provides that

> "District courts shall have jurisdiction to enjoin the illegal levy of taxes and assessments, or the collection of either, and of actions to recover back such taxes or assessments as have been collected, without regard to the amount thereof,"

with the limitation that the action must be brought within one year after the collection.

Section 89-4202 of the Wyoming Revised Statutes provides:

> "Actions to enjoin the illegal levy of taxes and assessments must be brought against the corporation or person for whose use and benefit the levy is made; and if the levy would go upon the tax list, the county treasurer must be joined in the action."

The provision of Section 89-4203 of the Wyoming Revised Statutes is as follows:

> "Actions to enjoin the collection of taxes and assessments must be brought against the officer whose duty it is to collect the same; actions to recover back taxes and assessments must be brought against the officer who made the collection, or, if he is dead, against his personal representative; and when they were not collected on the tax list, the corporation which made the levy must be joined in the action; provided, that when the money derived from said taxes or assessments has been actually paid over to any county or municipal corporation for whose use and benefit it was levied or collected, then an action shall be brought against said county or municipal corporation to recover said taxes or assessments."

Under the system provided by the Wyoming statutes for the collection and distribution of taxes, the County Treasurer is made the tax collecting officer for not only the county but the municipalities and state. The language of Section 30-1103 of the Wyoming Revised Statutes is as follows:

> "The county treasurer of each county shall be, by virtue of his office, collector of taxes therein * * *."

Section 30-1113 of the Wyoming Revised Statutes provides that—

> "Every county treasurer shall pay over to the state treasurer all state taxes and other monies received by him from the county collector on account of the state * * *."

Section 115-308 of the Wyoming Revised Statutes provides that—

> "* * * The treasurer of each county * * * on or before the 10th day of January of each year * * * shall make a full and complete settlement with the state treasurer for the state's proportion of all taxes collected before January 1st, and on or before the 25th day of July the said treasurer shall make a full and complete settlement with the state treasurer for the remainder of the tax levy of the preceding year. * * *."

The remainder of the section provides for penalties in the event of the failure of the treasurer to comply with the statutory requirements.

The provisions of Section 115-1005 and Section 115-1006 of the Wyoming Revised Statutes are as follows:

> "The amount of tax collected by the county treasurer shall be held by him like other taxes on account of the tax levied for municipal purposes for such city or town within his county and shall be paid by him directly to the treasurer of the proper city or town and he shall take his receipt therefor, deducting therefrom, however, a sum equal to one-half of one per cent. of the amount of the tax collected, which percentage shall be turned into the county treasury to reimburse the county for any extra expense for stationery or clerical

services to which the county may be put by reason of assessing and collecting the taxes for such municipality.

"It shall be the duty of the county treasurer of each county to keep an accurate record of all funds in his hands and due to the respective cities, towns, school districts, irrigation districts and drainage districts and county libraries all funds theretofore collected by him for the benefit of the respective city, town, school district, irrigation district, drainage district or county libraries."

Section 115-311 of the Wyoming Statutes affords no remedy whatever. It simply imposes a duty upon the Board of County Commissioners to direct the refunding of illegal taxes already paid. The board may, either for reasons deemed by it to be sufficient, or arbitrarily and without any reason, refuse to comply with the duty imposed. In that event the aggrieved taxpayer would be obliged to resort to the courts and of necessity would have to sue in each of the four counties, because each county would separately owe the amount erroneously paid to it, and manifestly, there could be no joint judgment.

It will be observed also that under the provisions of Wyoming Revised Statutes 89-4201-03 the taxpayer who has paid taxes not legally due would have to sue each of the four county treasurers and in addition would have to sue each of the municipalities—cities, towns, school districts, etc.—to which distribution of taxes had been made; and not only this, but he would not be able under any circumstances to recover such portion of the illegal tax as had already been distributed by the county treasurer to the state.

(b) *Failure of Wyoming statutes to provide for payment of interest.*

Sections 89-4201-03 of Wyoming Revised Statutes make no provision for the payment of interest on the money ille-

gally held by the county or the municipalities within the county. Under these circumstances it cannot be successfully contended that the remedy at law, even aside from the element of multiplicity of suits, is as adequate, complete, certain and efficient for the prompt administration of justice as the remedy in equity.

In *Hopkins* v. *Southern Calif. Tel. Co.* 275 U. S. 393, the Court held that equity had jurisdiction not alone upon the ground of the avoidance of multiplicity of suits, but because the statute authorizing the recovery of illegal taxes paid did not authorize the recovery of interest, and said (399):

> "In no permitted proceeding of law could interest upon payments be recovered for the time necessary to obtain judgments. The county and sixteen municipalities were interested in the taxes demanded and if petitioners had received payments, it would have been incumbent upon them to make prompt distribution. Considering all the circumstances, we find no clear, adequate remedy at law. The equity proceeding was permissible."

The same question was under consideration in *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20, in which the court held that, in view of the multiplicity of actions involved in the exercise of the statutory right to recover illegal taxes paid, and that the proportion of the tax paid to the state could not under any circumstances be recovered, the statute afforded no adequate remedy and the aggrieved taxpayer had the right to bring an equity suit in the Federal Court.

In *Proctor & Gamble Distributing Co.* v. *Sherman,* 2 Fed. (2d) 165, it was held that a statute authorizing the recovery of taxes illegally paid, but making no provision for interest does not afford an adequate remedy. The Court said (166):

> "But, quite independently of such doubts, the relief is quite inadequate because of the express refusal to allow interest. * * * While I have been referred

to no decision on the point, it seems to me plain that it is not an adequate remedy, after taking away a man's money as a condition of allowing him to contest his tax, merely to hand it back, when, no matter how long after, he establishes that he ought never to have been required to pay at all. Whatever may have been our archaic notions about interest, in modern financial communities a dollar today is worth more than a dollar next year and to ignore the interval as immaterial is to contradict well-settled beliefs about value. The present use of my money is itself a thing of value, and if I get no compensation for its loss, my remedy does not altogether right my wrong."

In the recent case of *Nutt* v. *Ellerbe,* 56 Fed. (2d) 1058, in dealing with the question of interest the court said:

"But there is another reason why the remedy provided by Sections 511 and 512 of the Code of 1922 is inadequate. Those sections provide merely for the recovery of the amount of the tax, and no interest. Whatever may be said as to those views which were entertained in remote times respecting interest, considering such exactions in all cases usurious or illegal, if not positively sinful, yet in modern times such archaic notions have long since been abandoned. Money is now a proper subject of hire, and the habits and customs of the people and modern law all concur in recognizing that interest is a proper means of compensation for the use of money lent or wrongfully detained. A remedy which does not provide for a reasonable amount of interest is not a complete or adequate remedy. *Southern Ry. Co.* v. *Query* (D. C.) 21 F. (2d) 333, 342. *Monarch Mills* v. *S. C. Tax Comm.* 149 S. C. 219, 146 S. E. 870.

"It has been repeatedly held that the remedy at law must be plain and where there is doubt about it the taxpayer is not required to speculate and take the chance of being able to recover at law. *Davis* v. *Wakelee,* 156 U. S. 680, 115 S. Ct. 555, 39 L. Ed. 578; *Union Pac. R. Co.* v. *Board of Commissioners of Weld County,* 247 U. S. 282, 38 S. Ct. 510, 62 L. Ed. 1110; *Atl. Coast Line R. Co.* v. *Doughton,* 262 U. S. 413, 426, 43 S. Ct. 620, 67 L. Ed. 1051, and cases cited therein."

We are aware that there is a conflict of authority on the

question whether, in the absence of a statute authorizing interest, a taxpayer recovering a tax erroneously paid is also entitled to interest. The conflicting lines of authorities are collected and referred to in A. L. R. Annotations to *Schlesinger* v. *State of Wis.*, 218 N. W. 440, 57 A. L. R. 352, and *Philadelphia & Reading Coal & Iron Co.* v. *School District,* 156 Atl. 75 (Pa.), 76 A. L. R. 1007. The construction of a state statute is the concern of the State Supreme Court. We have been unable to find any Wyoming decisions as to whether or not interest would be recoverable under these statutes. It would remain a matter of doubt whether interest would be recoverable until the State Supreme Court had spoken. Whatever it said would be decisive of the question. Not only the state courts but the federal courts as well would give to the state statute the construction which the State Supreme Court put upon it. In the absence of a State Supreme Court decision, a federal court to which the question would be presented would decide it, we assume. But how? Affirmatively, as in *Erskine* v. *Van Arsdale,* 15 Wall. 75, 21 L. Ed. 63, or negatively, as in *Hopkins* v. *Southern California Telephone Co.,* 275 U. S. 393? And if, during the pendency of the suit but before final judgment, the State Supreme Court came out with a decision denying the right to interest, the federal courts would follow that decision in dealing with the same statute, whatever its own thoughts might be as to the construction it would have placed on the statute. So the remedy by suit to recover the illegal tax would remain doubtful as to interest, whether in state or federal court, right to the moment of collection of a final judgment, because up to that time a State Supreme Court decision, now absent, might settle the question. Independently of all other considerations, therefore, the inadequacy of the remedy by suit for refund is clearly shown.

5. Wyoming Revised Statutes, Section 115-512, Not Adequate Remedy.

Although the taxpayer is ordinarily and by the rule of comity required to exhaust his administrative remedy, when the controversy reaches the justiciable stage he has the right to choose his own forum and may resort to the Federal courts without regard to state statutory provisions, and need not resort to appeal under Section 115-512 of Wyoming Revised Statutes, whether or not the functions attempted to be vested in the state court by that statute are judicial, because if such functions are administrative or legislative in character, the statute is invalid under the Wyoming Constitution.

Sec. 1, Art. II, Wyoming State Constitution.
Sec. 1, 10, Art. V, Wyoming State Constitution.
Wyoming Revised Statutes, 115-512.
Wyoming Revised Statutes, 91-306, 310.
Wyoming Revised Statutes, 89-302.
Wyoming Revised Statutes, 115-1809.
Midwest Hotel Co. v. *State Board of Equalization,* 39 Wyo. 461, 273 Pac. 696.
Bucknum v. *Johnson,* 21 Wyo. 26, 127 Pac. 904.
Railroad & Warehouse Commission of Minnesota v. *Duluth Street Ry. Co.,* 273 U. S. 625.
Duluth v. *Railroad & Warehouse Commission,* 209 N. W. 10.
3 Storey's Commentaries on the Constitution, p. 626.
Ex Parte Evans, 72 S. C. 547, 52 S. E. 420.
Elliott on Appellate Procedure, Sec. 15.
City of Aurora v. *Schoberlin,* 230 Ill. 496, 82 N. E. 860.
Mackin v. *Taylor County Court,* 38 W. Va. 338, 18 S. E. 632.

State v. *Burdick,* 3 Wyo. 587, 28 Pac. 146.
The Farm Inv. Co. v. *Carpenter,* 9 Wyo. 110, 61 Pac. 258.
State ex rel. Wycoff v. *Ross,* 31 Wyo. 500, 228 Pac. 636.
Bacon v. *Rutland R. R. Co.,* 232 U. S. 134, 137.
Prentis v. *Atlantic Coast Line Co.,* 211 U. S. 210.
Detroit & Mackinac Ry. Co. v. *Michigan R. R. Commission,* 235 U. S. 402.
Prendergast v. *N. Y. Telephone Co.,* 262 U. S. 43.
C. & N. W. Ry. Co. v. *Bauman,* 69 F. (2d) 171. Certiorari denied. *Bauman* v. *C. & N. W.* ..... U. S. .....
City Bank Farmers Trust Co. v. *Schrader,* 291 U. S. 24.
Goldsmith v. *Standard Chemical Company,* 23 F. (2d) 313.

Section 1 of Article II of the state constitution, to which reference has already been made, separates the legislative, executive and judicial departments of the state government, and provides that no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as the provisions of the constitution may expressly direct or permit.

The judicial powers of the state are vested in certain named courts by Section 1 of Article V, the language of which is as follows:

> "The judicial power of the state shall be vested in the senate, sitting as a court of impeachment, in a supreme court, district courts, justices of the peace, courts of arbitration and such courts as the legislature may, by general law, establish for incorporated cities or incorporated towns."

By Section 10 of the same Article, district courts are given jurisdiction

> "of all causes at law and in equity, * * * of such special cases and proceedings as are not otherwise provided for * * * (and) shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court. * * *"

The section also provides that district courts

> "shall have such appellate jurisdiction in cases arising in justices and other inferior courts in their respective counties as may be prescribed by law. * * *"

It will be observed that under these constitutional provisions the courts cannot exercise any functions other than judicial; that the entire judicial power is vested in certain named courts, including the district courts; and that the appellate jurisdiction of the district courts is limited to "cases" arising in inferior courts.

Section 115-512 of the Wyoming Revised Statutes provides that any party aggrieved by a valuation fixed by the State Board of Equalization may take an appeal to the District Court, "where a trial *de novo* to the court shall be had." The party appealing shall, within sixty days after the decision of the Board, file in the District Court a "petition setting out the cause of complaint" and a certified copy of the records of the Board; and shall at the time of filing the appeal furnish a bond to the State of Wyoming to be approved by the clerk of the District Court, the amount of which is to be fixed by the District Judge, conditioned that the appeal will be prosecuted without unnecessary delay and for the payment of all costs, taxes, interest and penalties that may be ultimately levied on the property. The clerk is required to notify the secretary of the Board and supply him with a copy of the petition. The Attorney General and the County Attorney are required to represent the Board in the proceedings on appeal. And all pro-

ceedings on appeal, except as otherwise provided in the appeal statute, are to be governed by the provisions of the Code of Civil Procedure, "as in other civil cases."

The petitioners contend that the plaintiff had an adequate remedy under this statute by appeal from the valuation fixed by the State Board to the district court; and, presumably to avoid the effect of the rule that the complaining party may, as soon as the administrative steps are exhausted, choose his own judicial forum, they insist in their supplemental brief that the state district court on appeal exercises administrative or legislative functions rather than judicial functions.

Our position is that whether the functions of the state court on appeal from the State Board of Equalization are judicial on the one hand, or legislative or administrative on the other hand, the complaining taxpayer is not, in either event, required to resort to such appeal before proceeding in the Federal court. If the state court acts in a judicial capacity it necessarily follows that the legislative or administrative remedy was complete with the final action of the State Board in making its order of July 14, 1931, and that the plaintiff had the right to choose his own forum. If the state court on appeal acts in a legislative or administrative capacity, the statute itself is necessarily unconstitutional, because under Section 1 of Article II, already quoted, the courts cannot under any circumstances exercise executive or legislative functions.

Counsel for petitioners call attention, in their supplemental brief, to the case of *Midwest Hotel Company* v. *State Board of Equalization,* 39 Wyo. 461, 273 Pac. 696, and say that the District Court in this case acted in an administrative capacity, arguing (P. 4 of supplemental brief) that "the District Court has been charged by the legislature, in addition to its judicial functions, with the duty of performing administrative functions with authority to de-

termine the valuation of respondent's property," and that the "hearing *de novo* (provided for by the statute) is an integral part of the administrative procedure adopted by the legislature as a method for levying and collecting taxes on railroad property."

There is nothing in the opinion of the case cited by counsel for petitioners indicating that the court was acting in a legislative or administrative capacity. In fact, the question of its jurisdiction with reference to the constitutional provision separating the powers of the state government was not mentioned in the opinion, and, so far as we have been able to find, has not been discussed in any decision of the Wyoming Supreme Court, and the question should, therefore, now be determined by this Court. *Risty* v. *Chicago, Rock Island & Pacific R. Co.*, 270 U. S. 378. In the *Midwest Hotel case* the Supreme Court sustained the ruling of the trial court that the District Court was without jurisdiction, and assigned as the reason for its holding that the appeal statute as it then existed made no provision for procedure governing the appeal.

Petitioners argue that the amendment adopted after this decision and now appearing as Wyoming Revised Statutes 115-512 supplies the omissions in the earlier statute as to procedure. We think that the correctness of this contention is subject to very serious doubt. It will be noted that the statute (Wyoming Revised Statutes 115-512) makes no provision for the formation of issues. It provides that the appellant "shall * * * file in the District Court * * * a petition setting out the cause of the complaint * * *," but it does not make any provision for the filing by anyone of an answer. It designates an appellant as the party claiming himself to be aggrieved by the decision of the State Board; but it makes no provision at all as to who the appellee shall be. A "case" either at law or in equity cannot exist without pleadings or without parties, one af-

firming a right under facts claimed to exist and the other denying that right. It probably will not be contended that the court can supply the parties; but if such a contention should be made, and if the court should supply the parties and direct them to be brought in, it certainly would direct the bringing in of the parties in interest, that is, the parties affected by the order that the court might make. These would, of necessity, include the state as well as the counties, because the state, as well as the counties, shares in the taxes collected by the county treasurers. But the state is immune from suit, except by its own consent.

There is nothing in the appeal statute as to the scope of the proceedings in the District Court—whether the court will take new evidence or whether it will confine itself to a consideration of the evidence submitted before the State Board. This would be an inadequate remedy, under *C. B. & Q. R. Co.* v. *Osborne,* 265 U. S. 14, in which it was held that a proceeding merely to review the action of the State Board on the record before it does not constitute an adequate remedy.

The court in the *Midwest Hotel case,* in pointing out the procedural defects in the law as it then existed, called attention to the fact that "neither the time within which the appellate proceeding is to be commenced, nor the manner of its consideration by the reviewing court, are prescribed," and then proceeded to ask a number of questions: "Shall the district court correct only errors of law alleged to be committed by the State Board of Equalization, or shall it re-try the matter in its entirety, taking evidence anew, framing new issues, and considering matters not submitted to the tribunal whose action is attacked? Shall the district court undertake to substitute its judgment on questions thus brought before it for review for that of the State Board of Equalization, or shall the court be limited to keeping the Board's action within the latter's proper

sphere, as defined by the constitution and laws enacted pursuant thereto?" And the court then adds: "Faced with these inquiries the statute before us is wholly silent."

Faced with the same inquiries, the present statute is almost completely silent. It says that the trial on appeal shall be "*de novo.*" But it does not say what "*de novo*" means; and it may as well mean a decision "*de novo*" upon the question of valuation and upon the evidence submitted to the State Board as a decision on the same question but with the submission of new evidence. The statute still leaves undetermined the question as to whether the District Court shall "correct only errors of law alleged to be committed by the State Board of Equalization," or whether it shall "re-try the matter in its entirety," whether it shall "take evidence anew," whether it shall "frame new issues," and whether it shall "consider matters not submitted to the tribunal whose action is attacked." We submit that the new matter as to procedure contained in the present statute fails utterly to supply the defects which caused the court, in the *Midwest Hotel case*, to hold that the statute was unconstitutional.

Reference is made by counsel for petitioners, at Page 4 of their supplemental brief, to Wyoming Revised Statutes 91-306, and to the case of *Bucknum* v. *Johnson*, 21 Wyo. 26, 127 Pac. 904, decided under the provisions of this section; and they say Wyoming Revised Statutes 115-512 is "identical in purpose to Section 91-306."

Section 91-306 is but one of five sections of the statute relating to the appeal and procedure upon appeal from a decision of the State Land Board to the District Court. The procedure outlined supplies all the elements omitted from the statute relating to an appeal from the State Board. It designates the parties, plaintiff and defendant (Wyoming Revised Statutes 91-306). It provides for the filing of a

notice of appeal with the secretary of the State Board and with the District Court (Wyoming Revised Statutes 91-307). It requires the clerk of the court to transmit the evidence submitted to the Board and the records of the proceedings there to the District Court (Wyoming Revised Statutes 91-308). It provides that the case in the District Court is to be heard on the pleadings filed before the Board unless the court shall order the filing of new pleadings (Wyoming Revised Statutes 91-308). It provides for the taking of evidence in the District Court and "other proceedings had as in the trial of a civil action before said court." It provides for the notice to be issued by the District Court clerk upon the filing of the bond (Wyoming Revised Statutes 91-309) and that the case shall be deemed ready for hearing upon the expiration of the time stipulated in the notice; and it provides for an appeal from the judgment of the District Court to the state Supreme Court (Wyoming Revised Statutes 91-310). None of these provisions are found in the statute relating to the appeal to the District Court from the State Board of Equalization; and it is a matter of serious doubt whether the Supreme Court of the state, if the constitutionality of the latter statute were now called to its attention, as the former statute was in the Midwest Hotel Company case, would not now hold, as it did in that case, that the statute as to procedure on appeal is so defective as to make it void.

At least, the determination of the question is so doubtful that the taxpayer ought not to be required to speculate as to what the court might hold and take his chance that the state court would assume jurisdiction. *Railroad & Warehouse Commission of Minnesota* v. *Duluth Street Railway Co.*, 273 U. S. 625; *Union Pacific Railway Co.* v. *Board of Commissioners, Weld County,* 247 U. S. 282.

Another reason readily suggests itself why the procedure under Wyoming Revised Statutes 115-512 is not an ade-

quate remedy. The decision of the State Board from which defendants contend plaintiff should have taken an appeal was made July 14, 1931 (R. p. 51). The Board is required, under the provisions of Wyoming Revised Statutes 115-1809, "on or before the first Monday in July, or as soon thereafter as the said Board or any two thereof shall have made and determined such valuation and assessment," to certify the same to the county assessors; and the county commissioners are required, thereupon, to divide the valuation among the school districts within the respective counties and to cause the valuations thus apportioned to be placed on the list of taxable property returned by the several assessors.

Under the provisions of the same section, fifty per cent of the annual tax falls due and becomes a lien on the property involved on the 1st of September, and becomes delinquent on the 10th of November. There is no time fixed by the appeal statute for the filing of an answer by the appellee or appellees, whoever they may be, or for the determination of the appeal. The appellant has sixty days from the date of the Board's decision within which to file its appeal, so that the appeal need not have been filed in this case until the 14th of September, and in the ordinary course of business of the District Court would probably not be determined, if at all, until some time in December. What action would the State Board and the county assessors and treasurers have taken in the meantime? In compliance with its statutory duty, the State Board would have certified the valuation as fixed by it to the county assessors long before an appeal would be taken, and with such certification the matter would be entirely out of the Board's hands. Following such certification by the Board, the property would be put on the tax rolls and the taxes levied thereon would become a lien on the taxpayer's property and a cloud on its title—and all this before the time for the institution of the

appeal had expired. And even after the institution of the appeal, there is no provision of the statute that would require any further action by either the Board or the county officers to be stayed. *C. B. & Q. R. Co.* v. *Osborne*, 265 U. S. 14. On the contrary, the statute (Wyoming Revised Statutes 115-515) explicitly requires the county officers to levy and collect the taxes on the valuation originally fixed by the Board. So that notwithstanding the taking of an appeal, any action that the District Court, or, on further appeal (if there can be such appeal), the Supreme Court, might take would be futile so far as protecting the rights of the appellant are concerned.

Mr. Justice Holmes, speaking for the court in *Railroad & Warehouse Commission of Minnesota* v. *Duluth Street Railway Co.*, 273 U. S. 625, with reference to a similar situation, said (628):

> "Where, as here, a constitutional right is insisted on, we think it would be unjust to put the plaintiff to the chances of possibly reaching the desired result by an appeal to the state court, when at least it is possible that, as we have said, it would find itself too late if it afterwards went to the District Court of the United States. *Pac. Tel. & Tel. Co.* v. *Kuykendall*, 265 U. S. 196, 68 L. Ed. 975: *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290, 67 L. Ed. 659."

In the instant case, not only would it have been possible that the plaintiff, if it had followed the statutory procedure by appeal, would have been too late to get into the United States District Court, but it is certain that it would have been too late, because before it could have followed the statutory appeal through to a conclusion the taxes would have become a lien on its property and a cloud on its title thereto, and the treasurer, in performance of his statutory duty, would have proceeded to make collection.

Moreover, under most of the authorities no appeal whatever could have been taken, under any circumstances, from

the State Board of Equalization, an administrative body, to a court, because an appeal is merely a step in judicial procedure and cannot be taken from a non-judicial body to a judicial body. Particularly is this true where there is a constitutional separation of powers, and where, as in Wyoming, the appellate jurisdiction of the district courts is limited to cases arising in inferior courts. Wyoming Constitution, Article V, Sec. 10. This principle is very aptly stated by Judge Storey in his Commentaries on the Constitution (Vol. 3, p. 626), where he says:

> "The essential of appellate jurisdiction is that it reviews and corrects the proceedings in a case already instituted, and does not create that cause in reference to judicial tribunals; an appellate jurisdiction, therefore, necessarily implies that the subject matter has been instituted in and acted upon by some other court whose judgments or proceedings are to be reviewed."

In *Ex Parte Evans,* 72 South Carolina 547, 52 S. E. 420, in which the Court had before it the question as to whether an appeal would lie from an order of the city council to the Circuit Court, the Supreme Court of the State of South Carolina, after quoting Judge Storey, concludes:

> "In order, therefore, to give the Circuit Court appellate jurisdiction in the matter appealed from the city council, it must appear that the city council was, in the matter sought to be reviewed, acting in a judicial capacity, as distinguished from doing a ministerial, administrative, or discretionary act."

The same principle is recognized in Elliott on Appellate Procedure, in which the author (Sec. 15) says:

> "* * * The word ('appeal'), when accurately used in law matters, means the removal of a suit in equity, or of an action at law, from an inferior court to a superior court. * * * The matter of appeals is essentially, and throughout, judicial, and there can, in legal contemplation, be no appeal where there is no decision by a judicial tribunal. Two things are essential, the decision of a judicial tribunal of original jurisdic-

tion, and a superior court invested with authority to review the decision of the inferior tribunal."

In *City of Aurora* v. *Schoberlin,* 230 Ill. 496, 82 N. E. 860, where the court had under consideration the constitutionality of the statute authorizing an appeal to the state court under constitutional provisions identical with Section 1 of Article II, and Section 1 of Article V, of the Wyoming Constitution, relating to the distribution of powers of government and the vesting of the judicial powers in the courts, the Supreme Court of Illinois quoted with approval the language of Mr. Elliott in his work on appellate procedure and held the Illinois statute to be unconstitutional.

In *Mackin* v. *Taylor County Court,* 38 W. Va. 338, 18 S. E. 632, it was held that a statutory appeal could not be taken to a court from the county court, because the latter was a non-judicial body performing the functions of a Board of County Commissioners.

While, as already suggested, it makes no difference, so far as the determination of the case at bar is concerned, whether the functions of the state court on appeal from the State Board of Equalization are judicial, on the one hand, or administrative or legislative, on the other hand, it seems to us that the conclusion must be reached that the functions of that court are, in fact, judicial rather than administrative or legislative. The appeal statute, itself, provides that all proceedings on appeal, except as in the statute provided, shall be under the provisions of the Code of Civil Procedure, "as in other civil cases." Civil cases are, of necessity, judicial in their character and the language of the statute strongly indicates the legislative intent to make the functions of the court on appeal judicial in character.

Moreover, statutes will always be so construed as to make them constitutional if possible, and the only construction that can be put upon the statute under discussion that

would sustain its constitutionality is to construe the functions of the court as being judicial. As already noted, whether the functions of the District Court on appeal, under this statute, are judicial or otherwise, has never been decided by the Supreme Court of the state, although that court has frequently emphasized the necessity of maintaining the constitutional separation of the powers of the state government. *State* v. *Burdick,* 3 Wyo. 587, 28 Pac. 146; *The Farm Investment Company* v. *Carpenter,* 9 Wyo. 110, 61 Pac. 258; *State ex rel. Wycoff* v. *Ross,* 31 Wyo. 500, 228 Pac. 636.

To understand the uncertainty of the remedy afforded by the Wyoming appeal statute, it is only necessary to put one's self in the position of an aggrieved taxpayer contemplating and endeavoring to determine whether he should proceed under the Wyoming statute relating to appeal from the State Board of Equalization or, disregarding this remedy, go direct into the Federal equity court, as did the plaintiff in this case. The questions necessary to be answered are numerous. Is the proceeding designated by the statute as an appeal a "case" at all, within the meaning of Section 10 of Article V of the constitution, dividing the appellate jurisdiction of the District Court? To constitute a case within the meaning of the constitutional provision and of statutes relating to practice and procedure, must there not be at least two parties to the litigation? The statute indicating only the appellant, who is the appellee? Is it the county or the school districts or the municipalities or the state, or any or all of these, each having an interest in the taxes collected under the assessments to be levied upon the valuation fixed by the Board? By what process are the parties defendant or appellee to be brought into court, there being no provision made for a summons? How are the issues to be joined in the case? The statute providing only for the filing by the appellant of a petition set-

ting forth his cause of complaint, is there an answer to be filed by the appellee, whoever that may be? Or, if not, can there be issues without the filing of such an answer? Will the District Court frame the issues and when will they be required to be filed, and when is the case ready for trial?

What is the scope of the authority of the District Court on appeal? Does it determine the issues *de novo* and without being bound by the order of the Board but upon the evidence presented before the Board, or does it take new evidence? What order does the District Court make? Does it simply determine whether the valuation as fixed by the State Board is reasonable or unreasonable, or does it fix its own valuation? If the latter, how does it enforce its order upon the State Board or the county assessors or county treasurers? Since no appeal is provided for by the statute under consideration from the state court to the Supreme Court, does such an appeal lie?

In view of the statutory provisions relating to the duties of the Board of Equalization to certify its valuations to the county assessor and the duties of the county assessors to proceed upon the original valuations of the Board, rather than upon any valuation that may be fixed by the court, of what effect will be any reduction that the District Court on appeal might make in the valuation fixed by the Board? In the absence of provisions halting further action on the part of the Board and the county officers, is not any order that the court might make of no force or effect whatever?

There being no decision of the Wyoming Supreme Court answering any of these questions, the taxpayer aggrieved by the valuation fixed by the State Board and undertaking to find a remedy under the appeal statute would find himself engulfed in a cloud of doubt and speculation. In *Union Pacific Railway Co.* v. *Board of Commissioners of Weld County,* 247 U. S. 282, dealing with the construction of a statute of the State of Colorado, which presented fewer dif-

ficulties than that now under consideration, the Supreme Court said that "it is a settled principle of equity jurisprudence that, if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit. * * * Where equity can give relief plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law."

It was held in the case of *Atlantic Coast Line Company* v. *Daughton,* 262 U. S. 413, that a remedy provided for by a state statute which has not been construed by the state court of last resort will not be considered adequate. On this point, Mr. Justice Brandeis, speaking for the court, said (425):

> "On behalf of the state it was urged that the bill was properly dismissed by the district court because there is, under the laws of North Carolina, a plain, adequate, and complete remedy at law by which a taxpayer may recover the amount of an illegal tax paid by him under protest. Our attention has been called to several North Carolina cases and statutes bearing upon this contention. But the statute mainly relied upon is a recent one, which appears not to have been construed and applied by the highest court of the state. In the absence of such decision, we cannot say the remedy at law is plain and adequate. *Dawson* v. *Kentucky Distilleries & Warehouse Co.* 255 U. S. 288, 296, 65 L. ed. 638, 646, 41 Sup. Ct. Rep. 272; *Wallace* v. *Hines,* 253 U. S. 66, 68, 64 L. ed. 782, 785, 40 Sup. Ct. Rep. 435; *Shaffer* v. *Carter,* 252 U. S. 37, 47, 64 L. ed. 445, 454, 40 Sup. Ct. Rep. 221; *Union P. R. Co.* v. *Weld County,* 247 U. S. 282, 62 L. ed. 1110, 38 Sup. Ct. Rep. 510; *Davis* v. *Wakelee,* 156 U. S. 680, 688, 39 L. ed. 578, 584, 15 Sup. Ct. Rep. 535. We have therefore passed upon the merits."

Whatever may be the determination of the court as to the functions exercised by the state court on appeal from the State Board of Equalization, and whatever may be held as to the uncertainty of the state law and the inadequacy of its provisions with reference to procedure, the Federal courts have settled the question as to the adequacy of the

remedy by appeal under state law, and have repeatedly held that once the justiciable stage of the controversy has been reached, Federal equity jurisdiction is not to be defeated merely by a judicial remedy by appeal in a state court.

In *Risty* v. *Chicago, Rock Island & Pacific R. Co.* and consolidated cases, 270 U. S. 378, the question as to the adequacy of a state statutory remedy by appeal to the District Court from the decision of a Drainage District Board was presented for decision, the plaintiffs having sued in the Federal equity court to enjoin the county officers of Minnehaha County, South Dakota, from making any apportionment of benefits or assessments or costs affecting their property for the construction or repair of a drainage district, without resorting to an appeal to the state court under the state statute.

The court held that the necessary jurisdictional facts appearing, the plaintiffs were not required to resort to their remedy by appeal under the statute of the state, because that remedy was afforded only in the state court and that a law remedy sufficient to oust equity of jurisdiction must be a remedy in the Federal court. On this point the court said (388):

> "The remedy by appeal to the state court under Section 8469 does not appear to be co-extensive with the relief which equity can give. In any event, it is not one which may be availed of at law in the Federal courts, and the test of equity jurisdiction in a Federal court is the inadequacy of the remedy on the law side of that court and not the inadequacy of the remedies afforded by the state court. *Smyth* v. *Ames*, 169 U. S. 466, 42 L. Ed. 819; *C. B. & Q. R. R. Co.* v. *Osborne*, 264 U. S. 14."

The court said further, dealing with the question of uncertainty of the remedy under the state law (389):

> "The legal remedy under the state law being uncertain, the Federal court has jurisdiction in equity to enjoin the assessment. *Dawson* v. *Kentucky Distilleries & Warehouse Co.*, 255 U. S. 288."

In *Bacon* v. *Rutland R. R. Co.*, 232 U. S. 134, there was a bill in equity filed by the plaintiff in the Federal court to restrain the Public Service Commission of the State of Vermont from enforcing an order concerning a passenger station at Vergennes, which order was claimed by the plaintiff to violate its right under the Fourteenth Amendment. There was a motion by the defendant to dismiss upon the ground that the plaintiff had an adequate remedy at law by appeal under a state statute from the order of the Commission to the Supreme Court of the state. The motion was overruled and an injunction issued as prayed.

Distinguishing the case from that of *Prentis* v. *Atlantic Coast Line Company*, 211 U. S. 210, upon the ground that the right of appeal in the Prentis case was given by the constitution itself, by which also the court was given legislative powers, Mr. Justice Holmes, speaking for the Court, held that the Court on appeal under the Vermont statute exercised purely judicial functions; that, the Court not having legislative powers, and the justiciable stage of the controversy having been reached, the plaintiff was entitled to resort to the Federal equity court without exercising his right of appeal under the state statute; and that the injunction was properly issued by the trial court.

There is an interesting discussion of judicial and non-judicial powers, and of the earlier cases of *Prentis* v. *Atlantic Coast Line Company* and *Bacon* v. *Rutland R. R. Company*, in the case of *Detroit & Mackinac Railway Co.* v. *Michigan Railroad Commission*, 235 U. S. 402. In the State of Michigan there was a statute authorizing any party dissatisfied with the order of the State Railroad Commission to institute a suit in the state Circuit Court in Chancery to set aside the order, from which court there was provided an appeal to the Supreme Court, in both of which there was a decision unfavorable to the Railroad Com-

pany. That company then instituted a bill in equity in the Federal court, where the writ was denied upon the ground that the state court, under a constitutional provision of the State of Michigan strikingly similar to Article II of the Wyoming Constitution separating the executive, legislative and judicial departments, and under the Michigan appeal statute, acted in a judicial capacity and that therefore the final determination of the controversy in the Michigan Supreme Court was *res judicata*. There was a strong suggestion by Mr. Justice Holmes that if the Michigan statute had been so construed as to give to the state court on appeal legislative powers, the statute would have been unconstitutional.

In *Prendergast* v. *New York Telephone Co.*, 262 U. S. 43, the court had for consideration the question as to whether the plaintiff, before resorting to a Federal equity court for an injunction, should have exhausted his state statutory remedy by certiorari. The court held that the controversy was ripe for judicial proceedings with the order of the Commission and that since the procedure by review was judicial in its character, the plaintiff was entitled to choose his own forum and resort to the Federal equity court without pursuing his judicial remedy in the state court. On this point Mr. Justice Sanford, speaking for this Court, said (48):

> "Upon the making by the commission of the orders in question the proceedings had reached the judicial state entitling the company to resort to the court for relief. *Bacon* v. *Rutland R. Co.*, 232 U. S. 134, 137, 58 L. Ed. 538, 539, 34 Sup. Ct. Rep. 283, distinguishing *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 229, 53 L. Ed. 150, 160, 29 Sup. Ct. Rep. 67, in which an appeal had not been taken to the highest tribunal vested with the final legislative authority of the state. Here the commission is vested with the final legislative authority of the state in the rate-making process; the authority exercised by the state courts upon a re-

view by certiorari (*People ex rel. Central Park, N. & E. River R. Co.* v. *Willcox,* 194 N. Y. 383, 87 N. E. 517), being purely judicial and having no legislative character (Laws New York 1920, chap. 925, Sec. 1304, 1305, pp. 437, 438)."

In *C. & N. W. Railway Co.* v. *Bauman,* 69 Fed. (2d) 171, the question presented was as to whether it was incumbent upon the complaining taxpayer in a suit like that at bar to resort to the statutory remedy by appeal before suing for an injunction in the Federal Court, it being contended by the defendant county treasurers that the administrative remedy was not exhausted until the disposition of the case on appeal to the state court, and that until such disposition the right of the complaining taxpayer to choose his own forum did not arise.

The Circuit Court of Appeals of the Eighth Circuit, speaking through Circuit Judge Van Valkenburgh, said that while the Board of Equalization, in which the appeal was authorized to be taken, acted in an administrative capacity, the state court on appeal acted judicially, that the administrative remedy was exhausted with the action of the State Board, and that therefore the aggrieved taxpayer had the right to sue in the Federal equity court without resorting to the appeal under the state statute.

The court said (176):

"The adequacy of a remedy at law is not conclusively determined by the statutes of a state, nor permission to sue at law in the state court on the same cause of action. One entitled to sue in a Federal court is entitled to invoke its jurisdiction. * * * The test of equity jurisdiction in a Federal court is the inadequacy of the remedy on the law side of that court and not the inadequacy of the remedies afforded by the state courts. * * * Especially where such remedy at law, if available, would entail a multiplicity of suits, or where the legal remedy under the state law is uncertain."

This Court denied certiorari in this case April 9, 1934. *Bauman* v. *C. & N. W. Ry.*, ... U. S. .....

In *Railroad & Warehouse Commission of Minnesota* v. *Duluth Street Railway Co.*, 273 U. S. 625, the commission was authorized by statute to fix public utility rates and the statute provided for an appeal from the decision of the commission to the state District Court (627) "there the whole matter," in the language of the court, "fact and law, is to be tried before three judges without a jury. They are to find all material facts, including the fair value of the property and the reasonable rate of return, and to affirm, modify or reverse the order of the commission as may be required by law, the commission being directed to conform to their judgment in its final order. There is a further resort to the Supreme Court."

The bill in equity in that case was filed by the Street Railway Company to enjoin enforcement of an order fixing the fare to be fixed at six cents, upon the ground that the rate fixed was confiscatory.

It was claimed by the commission that the plaintiff was bound to exhaust the statutory appeal before resorting to the courts.

Calling attention to the fact that the Supreme Court of the State of Minnesota, in *Duluth* v. *Railroad & Warehouse Commission,* 209 N. W. 10, had held the appeal under the Minnesota statute to be judicial in character, the court held that the plaintiff was within his rights in resorting to the Federal court for an injunction without taking the statutory appeal. The court further said:

> "* * * It must be remembered that the requirement that state remedies be exhausted is not a fundamental principle of substantive law but merely a requirement of convenience or comity. Where, as here, a constitutional right is insisted on, we think it would be unjust to put the plaintiff to the chances of possibly

> reaching the desired result by an appeal to the state court, when at least it is possible that, as we have said, it would find itself too late if it afterwards went to the District Court of the United States. *Pacific T. & T. Co.* v. *Kuykendall,* 265 U. S. 196, 68 L. ed. 975; *Oklahoma Natural Gas Co.* v. *Russell,* 261 U. S. 290, 67 L. ed. 659."

If as a result of *Matthews* v. *Rodgers,* 284 U. S. 521, or otherwise, there ever was any doubt as to the right of the plaintiff here to resort to federal equity jurisdiction, notwithstanding Section 115-512 of the Wyoming Revised Statutes, that doubt seems completely removed by the decision of this court in the late case of *City Bank Farmers Trust Co.* v. *Schnader,* 291 U. S. 24, decided January 8, 1934. In that case the District Court for the Eastern District of Pennsylvania had dismissed a suit to enjoin the collection of a Pennsylvania inheritance tax. It was the position of the defendants in that case that under *Matthews* v. *Rodgers* plaintiff was required to proceed under a Pennsylvania statute which provided for an appeal to the Court of Common Pleas of that state from the appraisement made by the administrative body, which was the state department of revenue. On appeal from the decree of the District Court of the United States for the Eastern District of Pennsylvania, this court reversed and held that federal jurisdiction existed, pointing out that under the state statute the appeal must be entered in a state court specifically designated by the statute, and thus was not an ordinary proceeding. This court also pointed out that in that case the Commonwealth had conditioned the right to implead it, upon resort to a forum of its choice. So this court said that as the statutory remedy, if it be treated as an action at law, would lie only in the state court and is not cognizable by the federal courts, its existence cannot oust federal equity jurisdiction. The Wyoming statute upon which petitioners place reliance in the instant

case presents precisely the situation that the Pennsylvania statute did in *City Bank Co.* v. *Schnader,* and does not bar the present proceeding for exactly the same reason that the bill in that case was held by this Court to be properly brought.

It is clear from the authorities cited that the remedy provided by Wyoming Revised Statutes 115-512 does not preclude the aggrieved taxpayer from resorting to the Federal equity court without pursuing the remedy by appeal, for the following reasons:

1. The statute itself is so indefinite and incomplete, particularly with reference to its provisions relating to procedure, as to be entirely lacking in the element of certainty, adequacy and efficiency requisite to oust equity of jurisdiction, and as to leave the taxpayer to speculate upon the possibility of his securing under the appeal statute the relief to which he is entitled.

2. The remedy afforded by appeal under the statute does not meet the requirement that to oust a Federal equity court of jurisdiction there must be an adequate legal remedy in the Federal court.

3. If the state court on appeal, under the statute, exercises administrative functions, the statute itself is unconstitutional because under the Wyoming Constitution administrative powers cannot be vested in the state courts.

4. If the functions vested in the state court on appeal are judicial, as it seems to us they clearly are, the administrative remedy having been exhausted by the proceeding before the State Board, culminating in its order fixing the valuation of plaintiff's Wyoming property, plaintiff had the right to choose its own forum and to resort to the Federal courts without pursuing its judicial remedy in the state courts.

5. It is extremely doubtful whether, particularly in view of the Wyoming Constitutional provisions and the incompleteness of the provisions of the appeal statute relating to procedure, that the statute, in the absence of a decision of the Wyoming Supreme Court, affords any remedy whatever. The remedy, if any there be, being doubtful, the plaintiff cannot be required to resort to it before going into the Federal equity court, which alone can afford certain, adequate and efficient relief.

6. Cloud on Title.

Equity has jurisdiction to enjoin the collection of illegal taxes in order to prevent a cloud on taxpayer's property.

Union Pac. Ry. Co. v. *Ryan, Marshal of City of Cheyenne,* 113 U. S. 516.

Risty v. *C. R. I. & P. Ry. Co.* 270 U. S. 378.

Ohio River & Western Ry. Co. v. *Ditty,* 232 U. S. 576, 587.

Ogden City v. *Armstrong,* 168 U. S. 234.

Shaffer v. *Carter,* 252 U. S. 37.

Wallace v. *Hines,* 253 U. S. 66.

It is alleged in plaintiff's Bill of Complaint (R. 6) that the taxes alleged to be illegal constitute a lien upon plaintiff's property and a cloud upon its title to the same and that unless restrained the defendant County Treasurers will destrain and sell the property of the plaintiff located within the counties. These allegations are admitted in the answer (R. 22).

In the case of *Union Pacific* v. *Ryan, Marshall, City of Cheyenne,* 113 U. S. 516, it was held that the cloud upon the title to taxpayer's property arising out of the assessment of illegal taxes is in itself sufficient to give equity jurisdiction. The Court, speaking through Mr. Justice Bradley

and holding that there must be some equitable ground for relief besides the mere illegality of the tax, said (525):

> "It often happens, however, that the case is such that the person illegally taxed would suffer irremediable damage or be subject to vexatious litigation if he were compelled to resort to his legal remedy alone. For example, if the legal remedy consisted only of an action to recover back the money after it had been collected by distress and sale of the taxpayer's lands, the loss of his freehold by means of a tax sale would be a mischief hard to be remedied. Even the cloud cast upon his title by a tax under which such a sale could be made, would be a grievance which would entitle him to go into a court of equity for relief."

The other cases listed are to the same effect.

7. Sufficiency of Pleading.

The Bill of Complaint sufficiently alleges the indequacy of a legal remedy.

Equity Rule 25.

DeWitt v. *Hayes*, 2 Cal. 463, 56 A. D. 352, 354.

Dennis v. *M. & M. Ry. Co.*, 137 Ala. 649, 97 A. S. R. 69.

Town of Flagstaff v. *Gomez*, 242 Pac. 1003 (Ariz. 1916).

Martin v. *Baltimore & Ohio R. Co.*, 151 U. S. 673.

Appellant's counsel contended in the court below, and, we assume, will contend here that there is no allegation of necessity of equitable relief to avoid a multiplicity of suits. It is true that there is no formal allegation in the Bill of Complaint that plaintiff resorts to equity in order to avoid a multiplicity of actions at law. Such a formal explicit allegation is entirely unnecessary and, in fact, unavailing, unless accompanied by allegations of fact from which the Court may draw the inference that but for injunctive relief the plaintiff would be put to a multi-

plicity of suits, the rule being that facts and not conclusions or opinions must be pleaded, and that a mere allegation of the lack of a legal remedy, or the necessity of resorting to equity to avoid a multiplicity of suits, is a conclusion.

Equity Rule 25 is to the effect that "it shall be sufficient that a bill in equity shall contain * * a short and simple statement of the ultimate facts upon which the plaintiff seeks relief * * *"; and in conformity with this rule it is generally held by the courts that if facts are pleaded which show to the Court that the plaintiff is without an adequate legal remedy, whether the lack of legal remedy arises from threatened irreparable injury, the necessity of avoiding a multiplicity of suits, or any other proper circumstances, he states a cause of action warranting the issuance of an injunction, although no specific reference whatever is made in his Bill to "irreparable injury" or "multiplicity of suits". In other words, it is for the Court to determine upon the facts pleaded, considered, of course, in the light of statutory and adjudicated law, whether the plaintiff has, or has not, an adequate legal remedy.

Cases in which the question of the necessity of formal allegations as to multiplicity of suits, inadequacy of legal remedies, etc., are discussed are few; and we know of only one (*Town of Flagstaff* v. *Gomez,* 242 Pac. 1003 (Ariz.)) in which it was even contended that such formal allegations are necessary where facts are pleaded from which the conclusion follows. There are a number of cases in the books, however, in which it has been held that formal allegations, without allegations of facts from which the Court may draw the necessary conclusions, are insufficient.

In the case of *DeWitt* v. *Hayes,* 2 Cal. 463, 56 A. D. 352, 354, the Court said:

"In the present case, under the allegation of irrep-

> arable injury, the plaintiffs seek to avail themselves of a writ of injunction which has been styled the 'right arm of the law'. The simple allegation of irreparable injury is not sufficient; it should appear to the court from the facts set forth in the bill."

The distinction between pleading facts showing to the Court the necessity of equitable intervention, and alleging as mere conclusions that the plaintiff is threatened with irreparable injury, that he has no adequate legal remedy, or that he seeks to avoid multiplicity of suits, is clearly brought out by the Court in *Dennis* v. *M. & M. Ry. Co.*, 137 Ala. 649, A. S. R. 69, in which the Court says:

> "The averment of a mere conclusion as to such inadequacy, or as to the irreparable character of the injury, without the averment of facts to support the conclusion, is insufficient. (Citing authority.)"

In the case of *Town of Flagstaff* v. *Gomez*, 242 Pac. 1003 (Ariz. 1916), it was held that there is no necessity for a formal specific allegation of the lack of adequate remedy at law where the absence of such legal remedy appears from the facts alleged in the petition. The Court said:

> "It is claimed, however, that a writ of mandamus does not lie for the reason there is no formal allegation that there is no plain, speedy and adequate remedy at law. We think it is elementary that if a pleading sets up facts from which ultimate conclusions may be clearly drawn, the ultimate conclusions themselves need not be alleged."

The authorities clearly indicate the rule to be that allegations to the effect that the plaintiff has no adequate remedy at law, that he is threatened with irreparable injury, and that he seeks to avoid multiplicity of suits, are mere statements of conclusions of the pleader; that they are entirely unnecessary; but that the Bill must state facts warranting the conclusion to be drawn by the Court that in reality the plaintiff has no adequate legal remedy.

With the general rule in mind, we proceed to examine the factual allegations.

The Bill in this case alleges that a valuation was put upon plaintiff's property in Wyoming by the State Board of Equalization (R. 3); that the valuation was grossly excessive and constituted an arbitrary discrimination against the plaintiff (R. 3, 4, 5); that the total valuation on plaintiff's property in Wyoming was, by the State Board, apportioned to each of the several counties (R. 6); that the valuation so apportioned to each of the four counties was excessive (R. 6, 7); that the excessive valuation was certified to the four county assessors (R. 6); that each of the four county assessors levied taxes upon the value certified to him by the State Board, and placed the tax so levied upon the assessment roll and certified the same to the four County Treasurers for collection (R. 6); that the four County Treasurers threaten to and unless restrained will levy distraint upon plaintiff's property and sell the same for the tax so levied on an excessive and discriminatory valuation (R. 6); and that the illegal taxes levied constitute a lien upon plaintiff's property and a cloud upon the title to the same (R. 6). In addition, it is alleged that plaintiff has no plain, adequate and speedy remedy at law (R. 6, 7).

The allegations of fact above recited are all admitted by the defendants, although, of course, they do not admit the allegations of excessiveness of the tax nor the discrimination charged.

These allegations must be considered in the light of the Wyoming statutes under which the suits for refund would be brought. The United States District Court in Wyoming to which the bill was presented takes judicial notice of the statutes of that state, and therefore this court on review does likewise. *Martin* v. *B. & O. Ry. Co.*, 151 U. S. 673.

Section 89-4203 of the Wyoming Revised Statutes states that "Actions to recover back taxes and assessments must be brought against the officer who made the collection, or if he is dead, against his personal representative; * * * provided that when the money derived from said taxes or assessments has been actually paid over to any county or municipal corporation for whose use and benefit it was levied or collected, then an action shall be brought against said county or municipal corporation to recover said taxes or assessments." According to the bill in this case, the state taxing machinery had reached the point where each of four county treasurers was about to enforce collection of the amount claimed by his county on the discriminatory valuation. The amounts were different in the four various counties. Had payment been made in all four counties, what would have been defendants' remedy? Obviously, a suit against each county treasurer for the excess collected by him, as no one of the other three county treasurers would be liable for the excess collected by the treasurer of the first county. There could be no joint judgment against four county treasurers each of whom owed a different amount. The obligation is not a joint and several one but is a several obligation in each county, disconnected from any of the others. This is perfectly clear from the statute, and the statute is as much before the court as the factual allegations of the bill. What was required of the plaintiff was that these allegations show that such facts existed as would have brought into play the actions against the various county treasurers of which the statute speaks. This has been done. Taking the bill in one hand and the statute in the other (and this is exactly what the United States District Court in Wyoming did—R. 33), no other conclusion can be reached than that the statutory remedy by suit to recover the amounts paid meant a separate suit against each county treasurer making a

wrongful collection. Thus the injunctive remedy by stopping the excessive collection makes unnecessary the bringing of four suits to recover excess payments. The pleading thus shows facts from which the conclusion necessarily follows that the equitable remedy was necessary to avoid multiplicity of suits. Hence the bill is adequate.

8. Railroad Valued as a Unit.

The value of a railroad is in its use as a whole and its property should be valued for tax purposes as a unit.

Union Pac. Ry. Co. v. *Ryan, Marshall, City of Cheyenne,* 113 U. S. 516.
Fargo v. *Hart,* 193 U. S. 490.
Wallace v. *Hines,* 253 U. S. 66.

It is manifest that no part or section of an operating railroad has substantial value in itself and that the value of every part arises out of its connection as an integral part of the entire system. It is for this reason that the courts hold that a railroad system should be valued for tax purposes as a unit and that the value of any part of the system within a taxing unit should be fixed with reference to the system value.

In *Union Pacific Ry.* v. *Ryan, Marshall,* 113 U. S. 516, the Court said (522):

> "The difficulty of assessing the value of railroad property in separate parcels, located in distinct cities and townships, is almost insuperable. A railroad cannot be regarded as mere land, like farm land or building lots; its value depends upon the whole line as a unit, to be used as a thoroughfare and means of transportation."

9. Value of Carrier Property Is Measured by Value of Use.

The value of property for tax purposes is measured by the extent and value of its use.

Pittsburgh C. C. & St. L. Ry. Co. v. *Backus,* 154 U. S. 421.

C. C. C. & St. L. v. *Backus,* 154 U. S. 439.

M. & O. R. Co. v. *Schnipper,* 31 F. (2d) 587 (Dist. Ct. E. D. Ill.).

In *Pittsburgh C. C. & St. Louis Ry. Co.* v. *Backus, supra,* the plaintiff railroad company sued to enjoin the collection of illegal taxes by the treasurer of several counties in the State of Indiana. Among other questions presented to the Court was the question of the basis of value, particularly applied as to interstate carriers. On that point the Court said (430):

> "* * * when the statute provides that such property shall be assessed at its 'true cash value' it means to require that it shall be assessed at the value it has, as used, and by reason of its use."

The same rule is laid down by the Supreme Court in *C. C. C. & St. Louis Ry. Co.* v. *Backus, supra,* which was a suit to enjoin the collection of illegal taxes, in which the Court said (445):

> "The rule of property taxation is that the value of the property is the basis of taxation. It does not mean a tax upon the earnings which the property makes, nor for the privilege of using the property, but rests solely upon the value. But the value of property results from the use to which it is put and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use. The amount and profitable character of such use determines the value, and if property is taxed at its actual cash value it is taxed upon something which is created by the uses to which it is put."

The rule thus clearly stated by the Supreme Court is followed by the District Court for the Eastern Division of Illinois in the case of *M. & O. R. Co.* v. *Schnipper*, 31 Fed. (2d) 587.

10. Method of Fixing Railroad System Value.

The most accurate method of determining the railroad's operating system value is by the use of the average market value of its stocks and bonds and by capitalization of its net income and deducting therefrom the value of its non-operating property locally assessed.

Wyoming Constitution Art. 15, Sec. 10, 11. W. R. S. 115-1804.

Taylor v. *Secor*, 92 U. S. 575.

Chicago & N. W. Ry. Co. v. *Eveland*, 13 F. (2d) 442, 443 (C. C. A. 8).

Temmer v. *Denver Tramway Co.* 18 Fed. (2d) 226, 229 (C. C. A. 8).

M. & O. Ry. Co. v. *Schnipper*, 31 F. (2d) 587 (D. C. E. D. Ill.).

C. C. C. & St. L. Ry. Co. v. *Backus*, 154 U. S. 439.

Pittsburgh C. C. & St. L. Ry. Co. v. *Backus*, 154 U. S. 421.

The Wyoming Constitution, Art. 15, Sections 10 and 11, provides that railroad property shall be assessed by the State Board of Equalization at its actual value and that all property except as otherwise provided by the constitution shall be uniformly assessed. The constitutional provision is as follows:

"Sec. 10. The duties of the State Board shall be as follows: * * * To assess at their actual value the franchises, roadway, roadbed, rails and rolling stock and all other property used in the operation of all railroads and other common carriers, except machine shops, rolling mills and hotels in this state; such as-

sessed valuation shall be apportioned to the counties in which said roads and common carriers are located as a basis for taxation of such property; provided that the assessment so made shall not apply to incorporated towns and cities. Said Board shall also have power to equalize the valuation on all property in the several counties for the state revenue and such other duties as may be prescribed by law."

"SEC. 11. All property, except as in this constitution otherwise provided, shall be uniformly assessed for taxation and the legislature shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal."

The plaintiff, as shown by the evidence, arrived at the value of its operating property by taking the average five-year market value of its stocks and bonds (less the value of its non-operating property), and the average five-year value as shown by capitalizing its net income at six per cent. annually, and by adding the sum of the two values thus obtained and dividing by two, obtained the reported figure of $375,285,902.00 which figure reflects the average of the actual market value and the value of the use as measured by income.

The authorities are agreed that the method used by the company and by the State Board as above outlined in fixing the value of the company's operating property is a proper method for arriving at such value.

While it is the property that is the basis of the tax, the value of the property is fixed by the value and extent of its use. *C. C. C. & St. Louis Ry. Co.* v. *Backus,* 154 U. S. 439; *M. & O. R. Co.* v. *Schnipper,* 31 Fed. (2d) 587.

In the case of *Taylor* v. *Secor,* 92 U. S. 575, decided in 1875, the plaintiff sought to enjoin the defendant tax collector from collecting taxes claimed to have been levied upon an excess valuation. The first question disposed of by the Court in its opinion was as to the use of the market

value of stocks and bonds as determining the system value of the plaintiff's property.

On this point the Court said (605):

> "It is therefore obvious, that, when you have ascertained the current cash value of the whole funded debt, and the current cash value of the entire number of shares, you have, by the action of those who above all others can best estimate it, ascertained the true value of the road, all its property, its capital stock and its franchises; for these are all represented by the value of its bonded debt and of the shares of its capital stock."

In *C. & N. W. Ry. Co.* v. *Eveland,* 13 Fed. (2d) 442, a case almost identical with the case at bar and determining most of the questions here presented, the Court, dealing with the question now under consideration, says (443):

> "* * * In determining the value of the property of a railway company for the purposes of taxation, several classes of evidence are admissible; but the net earnings of the property and the market value of its stocks and bonds for a reasonable period antecedent to the making of the assessment constitute the most reliable and influential evidence of that value."

While this Court granted certiorari in the *Eveland case* (*Eveland* v. *C. & N. W. Ry. Co.,* 273 U. S. 680) after which the case was settled and dismissed pursuant to stipulation (273 U. S. 775), the quoted part of the opinion seems clearly in accord with the decisions generally.

The same question was presented in the case of *Temmer* v. *Denver Tramway Co.,* 18 Fed. (2d) 226, in which the *Eveland case* was cited with approval. Dealing with this question, the Court said (228):

> "The specific elements which enter into the actual value of a great railroad property as a going concern are: (1) 'The value of the use of such property in the operation of its railroads and its net revenue from such use, and (2) the current market value of its stocks and bonds.' *Chicago etc. Ry. Co.* v. *Eveland* (C. C. A.) 13 Fed. (2d.) 442."

In *Mobile & O. R. Co.* v. *Schnipper,* 31 F. (2d) 587, in which the plaintiff sought to restrain the collection of alleged excessive taxes, the Court held that the use of market value of stocks and bonds is a correct method of arriving at the system value, quoting the language of the Supreme Court, in *Taylor* v. *Secor,* 92 U. S. 575, and held further that non-carrier property should be deducted from the system market value. (This was done, of course, in the case at bar.) On this point the Court said (591):

> "In this connection we should notice that tax-exempt property and non-carrier property should be deducted from the market value of securities."

11. Miles-of-Road Improper Factor Arbitrarily Used.

The use of the miles-of-road factor in determining the value of the portion of a railroad system located within a particular jurisdiction, when the cost and amount of property per mile of road within the jurisdiction is substantially less than throughout the system, is a fundamentally wrong and arbitrary method of determining value, and when it results in substantially increasing the value of the property within the jurisdiction above its actual value, amounts to taxing within the jurisdiction property of the carrier located outside and to the taking of its property without due process of law in violation of the Fourteenth Amendment to the Federal Constitution and to an illegal discrimination in violation of Article 15, Section 11 of the Wyoming Constitution. It is a fraud in law, when so used in plain disregard of known facts.

Pittsburgh C. C. & St. L. Ry. Co. v. *Backus,* 154 U. S. 421.

Fargo v. *Hart, Auditor,* 193 U. S. 490.

Union Tank Line Co. v. *Wright,* 249 U. S. 275.

Wallace v. *Hines, Director,* 253 U. S. 66.

Southern Ry. Co. v. *Ky.,* 274 U. S. 76.

There can be no question, in view of the evidence, that the Board, in arriving at the value of the Wyoming property actually used as one of four factors 3.29 representing the proportion of the company's main track mileage located within the state of Wyoming. The testimony of Mr. McWhinnie to which we have referred in discussing the evidence and the trial court's findings of fact are conclusive on this point.

In passing, attention should be called to the fact that the use of the track mileage factor is a glaringly arbitrary method of arriving at the value of plaintiff's Wyoming property because of the provisions of Article 15, Section 10 of the Wyoming Constitution already quoted, restricting the jurisdiction of the State Board of Equalization to railroad property outside the limits of incorporated cities and towns. The evidence shows without dispute that there are several incorporated cities and towns along the line of of the plaintiff's railroad in Wyoming, including Casper, Riverton, Shoshoni, Hudson, Lander, Glenrock, Douglas and Lusk. All the property in the incorporated cities and towns, including the main line track, is locally assessed by the county assessors, and should, of course, be taken out of the figure 278.35 representing the total main line track mileage within the state because that figure includes the main track located within, as well as without, the incorporated cities and towns.

Upon the main point now under consideration we invite the Court's attention to the case of *Pittsburgh, C. C. & St. L. Ry. Co.* v. *Backus,* 154 U. S. 421, in which this Court discussed at some length the question when and under what circumstances it is proper to use a mileage factor of allocation. That case holds that where the carrier's property consists of "a single continuous line" of about the same value throughout, the miles-of-road factor is proper to be used. It also holds that quite the contrary is true where, as in

the case at bar, there is a vast difference in the character, cost and value of the property within and without the particular state. The uncontradicted testimony in this case showing these vast differences, is fully discussed at pages 12 to 20 of this brief under sub-head "Evidence" in this argument.

In *Fargo* v. *Hart, Auditor,* 193 U. S. 490, plaintiff Fargo, as president of American Express Company, filed suit to enjoin defendant State Auditor from collecting taxes alleged to have been erroneously assessed. Plaintiff's property was assessed on the basis of the value of its stocks and bonds and was allocated to the state (Indiana) on a mileage basis. Plaintiff contended that in levying the assessment on the basis of the value of miles of road, the defendant had taken into consideration, and levied assessment upon, great quantities of property of the plaintiff located outside the State of Indiana and had thus taken property without due process of law. This is the main question presented in the case.

The Court held that the defendant had in effect taxed property of the plaintiff outside the State of Indiana and had thus attempted to take plaintiff's property without due process of law and the judgment of the lower court was reversed. The Court said (449, 502):

> "The general principles to be applied are settled. A state cannot tax the privilege of carrying on commerce among the states. Neither can it tax property outside of its jurisdiction belonging to persons domiciled elsewhere. On the other hand, it can tax property permanently within its jurisdiction although belonging to persons domiciled elsewhere and used in commerce among the states. And when that property is part of a system and has its actual uses only in connection with other parts of the system, that fact may be considered by the state in taxing, even though the other parts of the system are outside of the state. The sleepers and rails of a railroad, or the posts and wires of a telegraph company, are worth more than the prepared

wood and the bars of steel or coils of wire, from their organic connection with other rails or wires and the rest of the apparatus of a working whole. This being clear, it is held reasonable and constitutional to get at the worth of such a line, in the absence of anything more special, by a mileage proportion. The tax is a tax on property, not on the privilege of doing the business, but it is intended to reach the intangible value due to what we have called the organic relation of the property in the state to the whole system. *Western U. Tel. Co.* v. *Taggart,* 163 U. S. 1, 21, 22. And this principle, established by many cases, has been extended by the cases first cited above to the lines of express companies, although those lines are not material lines upon the face of the earth. There is the same organic connection as in the other cases.

"It is obvious, however, that this notion of organic unity may be made a means of unlawfully taxing the privilege, or property outside the state, under the name of enhanced value or good will, if it is not closely confined to its true meaning. So long as it fairly may be assumed that the different parts of a line are about equal in value, a division by mileage is justifiable. But it is recognized in the cases that if, for instance, a railroad company had terminals in one state equal in value to all the rest of the line through another, the latter state could not make use of the unity of the road to equalize the value of every mile. That would be taxing property outside of the state under a pretense. *Pittsburgh C. C. & St. L. R. Co.* v. *Backus,* 154 U. S. 421, 431; *Western Union Tel* v. *Taggart,* 163 U. S. 1, 23; The same principle applies to personal property which the state would not have the right to tax directly, *Adams Exp. Co.* v. *Ohio State Auditor,* 165 U. S. 194, 227; S. C., 166 U. S. 185, 222, 223. In *Pittsburgh, C. C. & St. L. R. Co.* v. *Backus,* there was reason to suspect an infraction of constitutional rights, but the secretary of state testified that there was no assessment of property outside the state, 154 U. S. 434, and therefore the court could not say that there was more than a possible overvaluation by the board. Of course, if the board did not go beyond its jurisdiction, its decision was final. But the court recognized that if the facts charged had appeared, the case would have been

different. In the Express Company's cases previously decided, it was pointed out that there was nothing to show that the line might not fairly be assumed to be of substantially the same value throughout. But it was intimated on the pages just cited that if the companies should prove the fact to be otherwise, a different rule would apply, and the statutes were construed not to prevent such a difference from being taken into account.

* * * * *

"The difference is not a mere difference in valuation, it is a difference in principle, and in our opinion the principle adopted by the board was wrong. It involved an attempt to tax property beyond the jurisdiction of the state, and to throw an unconstitutional burden on commerce among the states."

Union Tank Line Co. v. *Wright, Comptroller General of Georgia*, 249 U. S. 275, is another case in which plaintiff sued to enjoin the levy of taxes on its tank cars in the State of Georgia on a valuation of $291,196.00 claiming the value of its cars to be only $47,310. The Georgia statute provided as follows: (280)

"SEC. 989. Each non-resident person or company whose sleeping cars are run in this state shall be taxed as follows: Ascertain the whole number of miles of railroad over which such sleeping cars are run, and ascertain the entire value of all sleeping cars of such person or company, then tax such sleeping cars at the regular tax rate imposed upon the property of this state in the same proportion to the entire value of such sleeping cars that the length of lines in this state over which such cars are run bears to the length of lines of all railroads over which such sleeping cars are run. * * *"

In accordance with this statute, the defendant comptroller fixed the valuation of plaintiff's property on a basis of the per cent of miles of track over which plaintiff's cars were operated in Georgia of the whole number of miles of track over which plaintiff operated its cars throughout the country.

Plaintiff alleged and proved that the average number of cars operated by it within the state was 57; that the value of each was $830, and the total value of the 57 cars was $47,310.

The Court held that the method provided by the statute and followed by the comptroller was arbitrary because of the fact that the number of miles of track over which the plaintiff operated its cars had no relation to the value of the average number of cars operated since it might operate a few cars over a long line of road in Georgia, while at the same time operating a great number of cars over a short line of road in other states. The Court said (281-283):

> "The scheme of the statute is what is sometimes called the track-mileage basis of apportionment. * * *.
>
> * * * * * *
>
> "A state may not tax property belonging to a foreign corporation which has never come within its borders,—to do so under any formula would violate the due process clause of the 14th Amendment. * * * but if the plan pursued is arbitrary and the consequent valuation grossly excessive, it must be condemned because of conflict with the commerce clause or the 14th Amendment or both. (Citing cases).
>
> "In the present case the comptroller general made no effort to assess according to real value or otherwise than upon the ratio which miles of railroad in Georgia over which the cars moved bore to total mileage so traversed in all states. Real values—the essential aim—of property within a state cannot be ascertained with even approximate accuracy by such process; the rule adopted has no necessary relation thereto. During a year two or three cars might pass over every mile of railroad in one state while hundreds constantly employed in another moved over lines of less total length. Fifty-seven was the average number of cars within Georgia during 1913 and each had a 'true' value of $830. Thus the total there subject to taxation amounted to $47,310,—the challenged assessment specified $291,196.
>
> "We think plaintiff in error's property was ap-

> praised according to an arbitrary method which produced results wholly unreasonable, and that to permit enforcement of the proposed tax would deprive it of property without due process of law and also unduly burden interstate commerce."

In this case, as in previous cases, the Court points out that use of the mile-of-road factor within and without the taxing jurisdiction when the values are not substantially the same and without taking this factor into consideration is an arbitrary method of arriving at value, warranting the granting of injunctive relief.

In *Wallace* v. *Hines, Director,* 253 U. S. 66, plaintiff sued defendants to enjoin the levy and collection of taxes against the Northern Pacific Railroad, based upon the percentage of main line track located in North Dakota of the entire main line track of the system. The North Dakota statute (68) provided:

> "that in the case of a railroad * * * having lines that enter into, extend out of or across the state, property within the state shall be held to mean that proportion of the entire property of such corporation engaged in such business which its mileage within the state bears to its entire mileage within and without the state."

The statute also provided that the value of the entire system should be figured on the value of its stocks and bonds.

The railroad company contended that by fixing the value of its property in the State of North Dakota on a basis of the proportion of its miles of track to the miles of track in the entire system, the defendants violated the Fourteenth Amendment to the Federal Constitution, prohibiting the taking of property without due process of law, because of the fact that the physical value of the mile of track in North Dakota is much less than that of the average amount of track throughout the system.

This Court sustained the railroad company's contention, holding the North Dakota statute already quoted to be unconstitutional.

This Court said that according to the allegations of the Bill, North Dakota is a state of plains, very different from other states, and that the cost of the roads in that state was much less than in other states, that most of its distributing centers and valuable terminals are in other states, and said (69):

> "So, looking only to the physical track, the injustice of assuming the value to be evenly distributed according to main track mileage is plain. * * *
>
> "The only reason for allowing a state to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess. The purpose is not to expose the heel of the system to a mortal dart,—not, in other words, to open to taxation what is not within the state. Therefore, no property of such an interstate road situated elsewhere can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the state. Hence the possession of bonds secured by mortgage of lands in other states, or of a land grant in another state, or of other property that adds to the riches of the corporation, but does not affect the North Dakota part of the road, is no sufficient ground for the increase of the tax,—whatever it may be,—whether a tax on property, or, as here, an excise upon doing business in the state. *St. Louis Southwestern R. Co.* v. *Arkansas,* 235 U. S. 350, 364. In this case it is alleged that the tax commissioner's valuation included items of the kind described to very large amounts. The foregoing considerations justify the preliminary injunction that was granted against what would appear to be an unwarranted interference with interstate commerce and a taking of property without due process of law. *Fargo* v. *Hart,* 193 U. S. 490; *Union Tank Line Co.* v. *Wright,* 249 U. S. 279, 282.

The principles of law established and recognized in the cases reviewed seem to be quite clear. The use of the mile-of-road factor is proper in some cases and improper in others, depending entirely upon the facts of the particular case. If it affirmatively appears in the evidence that the general characteristics are substantially the same within the taxing jurisdiction and throughout the system so that the company's property measured by a mile of road is actually worth about the same throughout the system, the use of the mile-of-road factor is proper because it fairly determines the percentage of the system value located within the taxing jurisdiction.

If it clearly appears from the evidence, on the other hand, that the property of the complaining taxpayer within the taxing jurisdiction is of a substantially lower character, cost and value than its property without the taxing jurisdiction, and if the facts showing the difference are known to the taxing authority the use of the mile-of-road factor, without taking into account this difference, constitutes the exercise by the taxing authority of arbitrary power and amounts to the taking of property without due process of law contrary to the Fourteenth Amendment to the Constitution, and constitutes an unlawful burden upon interstate commerce.

The application of the principles enunciated in the cases to the case at bar is clear. The evidence shows beyond question that, however measured—whether by the use of factors which the Courts have held to be the proper criterion of value, or by percentages of costs based upon the cost figures of the Interstate Commerce Commission adjusted to December 30, 1930, with proper allowances for depreciation as testified to by Mr. McWhinnie—a mile of road in Wyoming is worth approximately, and probably less than, one-half the value of the average system mile. The evidence in this respect is collected and summarized in this

brief under "Argument" sub-head "Evidence" at pages 12 to 20 inclusive. The testimony of Mr. Balch establishes this fact from a statistical standpoint (R. 51-70, 126-139), while the testimony of Mr. Lorch and the exhibits introduced by him establish the fact upon consideration of the principal items of physical property constituting the operating system of the company within the State of Wyoming and throughout the system. (R. 84-98).

12. Findings of Fact Conclusive on Arbitrary Action of Board.

Findings of fact concurred in by two lower courts will not be disturbed by the Supreme Court of the United States unless shown to be clearly erroneous.

Bodkin v. *Edwards,* 255 U. S. 221.
Charles H. Baker v. *John W. Schofield,* 243 U. S. 114.
Causey v. *U. S.,* 240 U. S. 399.
Gilson v. *U. S.,* 234 U. S. 380.
American Bank & Tr. Co. v. *Fed. Reserve Bank,* 262 U. S. 643.
Brewer Elliott Oil & Gas Co. v. *U. S.,* 260 U. S. 77.
Waterman Co. v. *Modern Pen Co.,* 235 U. S. 88.

The rule on this point is stated very clearly in *Bodkin* v. *Edwards, supra,* in which the Court said (223):

> "The case, as presented here, turns essentially on questions of fact. Both courts below, on a review of the evidence, have found the facts in the same way. This court, under a settled rule, accepts such concurring findings unless clear error is shown. *Page* v. *Rogers,* 211 U. S. 575, 577; *Washington Securities Co.* v. *U. S.,* 234 U. S. 76, 78; *Wright-Blodgett Co.* v. *U. S.,* 236 U. S. 397, 402; *National Bank* v. *Shackelford,* 239 U. S. 81."

The trial court (R. 44-45), as has already been mentioned, found that the quantity, quality, cost and value of plaintiff's

property within the state of Wyoming measured upon the miles-of-road basis were greatly less than throughout its system and that these facts were well-known to the State Board when it made its valuation; and also that the Board "used as a factor the percentage of plaintiff's main line track located in the state of Wyoming, to-wit, 3.29% without taking into account" the difference mentioned. The opinion of the trial judge accompanying the findings stresses the fact that the use of this factor by the Board with the true facts before it amounted to an arbitrary and unreasonable method. (R. 41) The Court of Appeals concurred in the findings of the trial court and called the Board's action "a fraud in law." (R. 157) Under the well established rule of the Supreme Court these findings will not be disturbed because not only are they not shown by the evidence to be clearly erroneous but on the contrary they are clearly shown to be supported by the evidence.

In this connection we wish to point out that what the trial court said (R. 42) to the effect that "reasonable and honest effort was made to fairly and honestly tax property and to secure the return of all property for taxation which is legally taxable" *pertained only to the allegations of intentional undervaluation and omission of other property. It did not relate at all to the separate findings and other part of the opinion in respect of the arbitrary overvaluation of plaintiff's property.* Petitioners' statement in their brief accompanying their petition for certiorari (pp. 15, 16) that a finding of intentional, arbitrary overvaluation of plaintiff's property is inconsistent with the quoted statement is erroneous. The exoneration which the court granted the Board on the charge of intentional undervaluation and omissions of other property did not extend to the other and separate offense of arbitrary overvaluation of plaintiff's property. Otherwise the court would not have termed the overvaluation "arbitrary" (R. 43) or an "arbitrary

and unreasonable method and the application of a wholly wrong method and principle" (R. 46) nor would the Circuit Court of Appeals have called it a "fraud in law." (R. 157)

13. Arbitrary Over-Valuation Violates Constitutional Rights.

The arbitrary, unreasonable, and systematic over-valuation of plaintiff's property constitutes discrimination in violation of its rights to equal protection of the laws under the 14th Amendment to the Federal Constitution and Article 1, Sec. 28 of the Wyoming Constitution.

U. S. Constitution, 14th Amendment.

Wyoming Constitution, Art. 1, Sec. 28.

Wyoming Constitution, Art. 15, Sec. 11.

Sioux City Bridge Co. v. *Dakota Co.* 260 U. S. 441.

Bohler, Tax Collector v. *Callaway,* 267 U. S. 479.

Greene v. *L. & I. R. Co.,* 244 U. S. 499, 37 S. Ct. 673.

Iowa-Des Moines Nat. Bank v. *Bennett,* 284 U. S. 239.

Taylor v. *L. & N. R. Co.,* 88 Fed. 350, 364-365, 373-374 (C. C. A. 6).

A. T. & S. F. R. Co. v. *Sullivan,* 173 Fed. 456, 470.

C. & N. W. Ry. Co. v. *Eveland,* 13 F. (2d) 442, 443 (C. C. A. 8).

C. & N. W. Ry. Co. v. *Bauman,* 69 F. (2) 171, 173.

L. & N. R. Co. v. *Bosworth,* 230 Fed. 191 (Dist. Ct. Ky.).

M. & O. R. Co. v. *Schnipper,* 31 F. (2) 587, Dist. Ct. E. D. Ill.).

Bunton v. *Rock Springs Grazing Assn.* 29 Wyo. 461, 215 Pac. 244.

People v. *C. B. & Q. R. Co.,* 300 Ill. 399, 133 N. E. 325, 326-327.

Lively v. *M. K. & T. Ry. Co.,* 102 Tex. 545, 120 S. W. 852, 856, 858.

One of the grounds for injunctive relief prayed for by the Bill of Complaint is that plaintiff's property was arbitrarily, systematically and persistently, over a period of years, overvalued each year to the extent of about two million dollars; that a great proportion of the other property in the state was omitted altogether from the tax rolls and that property generally was greatly undervalued. It is alleged that the discrimination thus resulting placed upon the plaintiff an undue proportion of the tax burden of the state and constituted a violation of his rights under the equal protection of the laws provisions of the 14th Amendment to the Federal Constitution and under the uniformity provisions of the State Constitution. The discrimination resulting in the violation of the taxpayer's rights may result from the over-assessment of his own property or the under-assessment of other property. In either case there is the inequality forbidden by the 14th Amendment to the Federal Constitution and the lack of uniformity commanded by the State Constitution. The trial court, in the instant case, found that there was not sufficient evidence to sustain plaintiff's allegations as to the undervaluation and omission of property other than its own, but found that plaintiff's property was overvalued to the extent of about one and one-half million dollars by the use of a mileage factor in the face of known facts showing vast differences in the per mile value of the taxpayer's property within and without the State. This overvaluation under the authorities constitutes a deprivation of plaintiff's constitutional rights. It is more than a mere error. It is arbitrary action, or, as the Circuit Court of Appeals said, "fraud in law."

The provision of Article 1, Sec. 28 of the State Constitution is that "all taxation shall be equal and uniform", while it is provided in Article 15, Sec. 11 that "all property * * * shall be uniformly assessed for taxation * * *".

It is contended in petitioners' brief that the Court has no jurisdiction to fix the value of a taxpayer's property. What the Court might do in a case where the State Board had failed entirely to supply a basis for valuation need not be considered in this case because the State Board in its order by proper methods established the system value of plaintiff's operating property and furnished the basis for the determination of the value of plaintiff's property within the state of Wyoming by the use of two proper factors and a third which, for the purposes of this case, may be considered as proper. Its arbitrary action consisted in the use of a fourth factor which the Court determined to be unlawful. All that the trial court did was to eliminate the improper factor and to arrive at the value—at which the Board ought to have arrived—by a mere mathematical calculation. In all the cases similar to the one at bar the courts, where they have set aside excessive values improperly arrived at by the taxing body, have determined and established correct values.

This was done in the case of *Sioux City Bridge Co.* v. *Dakota County,* 260 U. S. 441. In that case the taxing officials of the State of Nebraska arbitrarily assessed plaintiff bridge company's property at 100% of its value, and all the other real estate in the county at 55%. Holding that this constituted an invasion of plaintiff's constitutional right to equal protection of the laws the Court said (445):

> "The purpose of the equal protection clause of the 14th Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. And it must be regarded as settled that intentional, systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property. *Raymond* v. *Chicago Union Traction Co.,* 207 U. S. 20, 35, 37."

Following which the Court cites a number of analogous cases.

Holding that the function of the court in such cases is to reduce the valuation to a proper amount, the Court said (446):

> "This court holds that the right of the taxpayer whose property alone is taxed at 100 per cent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed, even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standard of true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law. In substance and effect, the decision of the Nebraska supreme court in this case upholds the violation of the 14th Amendment to the injury of the bridge company. We, must, therefore, reverse its judgment."

In *Iowa-Des Moines National Bank* v. *Bennett,* 248 U. S. 239, it was held that the act of a state official in taxing plaintiff's property at a higher percentage of value than that of other property is the act of the state within the meaning of the 14th Amendment, even when done in violation of state law, and constitutes an invasion of plaintiff's right to equal protection of the laws under that amendment.

In *Taylor* v. *L. & N. R. Co.,* 88 Fed. 350, under State Constitution provisions requiring uniform assessment on the basis of value, the Court said (364):

> "The sole and manifest purpose of the Constitution was to secure uniformity and equality of burden upon all the property in the state. As a means of doing so (conceding that defendant's construction is the correct one), it provided that the assessment should be according to its true value. It emphasized the object of the Section by expressly providing that no species of property should be taxed higher than any other species. We have before us a case in which the com-

plaining taxpayer and other taxpayers owning the same species of property, are taxed at a higher rate than the owners of other species of property. This does not come about by legislative discrimination but by the intentional and systematic disregard of the law by those charged with the duty of assessing all other species of property than that owned by complainant and it follows of the same class. This is a flagrant violation of the clause of the Constitution forbidding discrimination in taxation between different species of property."

Many of the cases dealing with the question of discrimination and lack of uniformity and the consequent denial of the property owner's rights under the equal protection provision of the Federal Constitution and the uniformity provisions of the State Constitutions deal with cases where the complaining taxpayer's property has been either assessed at its full value or over-assessed and in addition there has been an under-assessment of other property. The rule is the same where, though there is no undervaluation of other property, the complaining taxpayer's property is arbitrarily overvalued.

It is expressly so held as applied to such a state of facts in *Chicago & N. W.* v. *Eveland,* 13 Fed. (2d) 442, where the Court, dealing with the discrimination by overvaluation of plaintiff's property said (448):

"The evidence establishes the fact that the plaintiff presented to the tax commission similar objections, protests, schedules and testimony at the hearing before that commission on the assessment of the property in South Dakota of the plaintiff for 1921 and the seven previous years. The assessments for those years were as follows: 1914, $41,459,249; 1915, $41,796,850; 1916, $41,899,439; 1917, $41,945,624; 1918, $41,955,855; 1919, $41,960,113; 1920, $41,115,784; 1921, $41,956,406. This fact compels the conclusion that the overvaluation of the property of this railway company for purposes of taxation was not exceptional but has been and is systematic, persistent, established, and

that it threatens to be prolonged. Such an overvaluation, whereby the property of a complainant is made to bear an undue proportion of the burden of taxation, presents a good cause of action for relief from the payment of the unjust part of the tax. Nor is an evil intention of the members of the board which makes such persistent overvaluation to perpetrate such an injustice indispensable to the maintenance of a suit for relief in equity in such a case as that under consideration.

"The property of a railway company used and usable in the operation of its lines in South Dakota is required by its statutes to be assessed for taxation by the state tax commission. Rev. Code of S. D. 1919, Secs. 6596-6601. The real estate and personal property of corporations other than railway companies and of individuals are required to be assessed by different assessors or boards, and Section 6700 of the Code of South Dakota of 1919, requires that 'all property shall be assessed at its true and full value in money.' The legal presumption, in the absence of evidence on that subject, and there is none in this case, is that all property other than that of railway companies was assessed at its fair, full value. Instead of having all property subject to taxation in the state valued by the same commission or board, different boards or assessors valued for taxation different classes of property pursuant to the statutes of that state.

"In *Taylor* v. *Louisville & N. R. Co.* 88 F. 350, 374, 31 C. C. A. 537, 561, a case heard and decided by Judge Taft, now Chief Justice, Judge Lurton, subsequently Mr. Justice Lurton, and Judge Severens, Judge Taft, delivering the opinion of the court, said:

'The various boards whose united action is by law intended to effect a uniform assessment on all classes of property are to be regarded as one tribunal, and the whole assessment on all classes of property is to be regarded as one judgment. If any board which is an essential part of the taxing system intentionally, and therefore fraudulently, violates the law, by uniformly undervaluing certain classes of property, the assessment by other boards of other classes of property at the full value, though a literal compliance with the law, makes the whole assessment, considered as one

judgment, a fraud upon the fully-assessed property. And this is true although the particular board assessing the complainant's property may have been wholly free from fault of fraud or intentional discrimination.'

"By the same mark, if any board which is an essential part of the taxing system intentionally, and therefore fraudulently, violates the law, by uniformly overvaluing as in this case a certain class or classes of property, the assessment by other boards of other classes of property at their fair value, though a literal compliance with the law, makes the whole assessment, considered as one judgment, a fraud upon the overassessed property. And this is true, although the particular board assessing the complainant's property may have been wholly free from fault of fraud or intentional discrimination.

"In *Greene* v. *Louis. & Interurban R. Co.*, 244 U. S. 499, 518, 37 S. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88, the Supreme Court quoted and adopted this rule and declared that 'the justice of this view has been recognized by the state courts of last resort in many cases' and cited 11 cases in support of its statement.

"Moreover, the systematic, repeated, continuing violations of the Constitution or the law, to the injury of a complainant, like a continuing trespass, constitute persuasive evidence of intention so to do, inflict upon the injured party the same damage that they would if they were intentional, and present ample ground for relief in equity. *Atchison, T. & S. F. Ry. Co.* v. *Sullivan*, 173 F. 456, 461, 97 C. C. A. 1; *Wells Fargo & Co.* v. *Johnson*, 214 F. 180, 189, 130 C. C. A. 528, L. R. A. 1916C, 522 and cases there cited; *Cummings* v. *National Bank*, 101 U. S. 153, 158, 25 L. Ed. 903; *Raymond* v. *Chicago Traction Co.* 207 U. S. 20, 36, 37, 28 S. Ct. 7, 52 L. Ed. 78, 12 Ann Cas. 757."

The *Eveland case* is the one in which, as we have already pointed out at page 75 of our brief, this Court granted certiorari (*Eveland* v. *C. & N. W. Ry. Co.*, 273 U. S. 680), after which the case was settled and dismissed pursuant to stipulation (273 U. S. 775).

Chicago and North Western Railway Company v. *Bauman*, 69 Fed. (2d) 171, decided by the Circuit Court of

Appeals, Eighth Circuit, in February of this year, was a suit in equity by this same plaintiff to restrain the collection of taxes for 1931 (the same year here involved) in the adjoining state of Nebraska. Plaintiff's contention was that the arbitrary overvaluation of its property to the extent of about $6,000,000, preceded by systematic and persistent overvaluation over a period of years, constituted a violation of its rights under the Fourteenth Amendment to the Constitution of the United States. In both that case and this, there were allegations of more than mere miscalculation or mistake. Allegations in the *Bauman case* to the effect that the discrimination was intentional, persistent, and arbitrary were held sufficient to furnish a ground for federal equity relief as against the contention there made by the defendants that the allegations were insufficient to state a fraudulent discrimination. The Court specifically held (173) that where arbitrary overvaluation is charged it is unnecessary to plead in the alternative that other property was undervalued. The Circuit Court of Appeals reversed a decree of the District Court which had dismissed the bill for want of equity. The case was therefore remanded with directions to reinstate it upon the docket for hearing on the merits. The effect of the decision in the *Bauman case* is exactly that for which we contend here, viz., that where there is a charge (and in the case at bar, uncontradicted proof) of arbitrary action by wilful ignoring of known facts and use of a factor known to be wrong for the purpose of bringing into the state and taxing there property located in other states, it is unnecessary to allege or prove fraudulent intent on the part of the Board. This Court denied certiorari in the *Bauman case* April 9, 1934, ... U. S. .....

The testimony of Mr. Miller (R. 101) shows that the State Board for a period of five years prior to and including the year 1931, valued the plaintiff's property in Wyoming at

approximately the amount fixed by the Board in 1931, and that each of these years the plaintiff presented to the Board information showing its property to be worth approximately $2,000,000.00 less than the figure assessed by the Board, from which it appears that the overvaluation had been systematic.

The necessity of uniformity in the valuing of property for taxation purposes is clearly recognized by the Supreme Court of Wyoming in *Bunton* v. *Rock Springs Grazing Assn.*, 29 Wyoming 461. On this point the court said:

> "Section 11 of article 15 of the Constitution provides that:
>
> " 'All property, except as in this Constitution otherwise provided, shall be uniformly assessed for taxation, and the Legislature shall prescribe such regulations as shall secure a just valuation * * * of all property, real and personal.'
>
> "Under this provision, plaintiff had the right to have all the taxable property in the county, as well as in the state, assessed at a uniform rate, and a departure therefrom if made in an illegal manner is, where its property is assessed at full value, a discrimination against it which could not only be a fraud against plaintiff, but would also violate the constitutional provision of uniformity. Such discrimination may arise in various ways, for instance by the adoption of a wrong or illegal rule, principle, or method; and an unjust tax resulting therefrom has frequently been enjoined as illegal. * * * And without attempting to analyze the rule closely, it appears to be universally recognized by all the authorities that where assessors or boards of equalization are guilty of intentional and systematic discrimination, and probably intentional discrimination alone, such conduct is fraudulent and renders the excessive assessment and tax illegal, and authorizes a court of equity to interfere by injunction."

While most of the cases heretofore cited in this brief dealing with the question of discrimination by the overvaluation of complaining taxpayer's property or the undervaluation of other property use language in-

dicating that the discrimination must be intentional, it is clear from all of them that systematic and persistent discrimination over a considerable number of years sufficiently indicates the intention to discriminate, because the intent with which a thing is done being a state of mind is seldom susceptible of direct proof and must be inferred from the act or course of conduct indicating such intent.

When public officials ignore uncontradicted facts unquestionably known to them, and when those facts establish a vast difference in the character of property within and without the state, their use of a miles-of-road factor is so utterly indefensible as to constitute arbitrary action. Proof of evil intent adds nothing. Men's intent is judged by the effect of their acts. The clear effect of the act of the Board in using a mileage factor was to establish a device to bring into the state for taxation purposes property that never belonged there.

14. Value and Cost.

There is no necessary or essential relation between cost and value, and taxes can only be levied upon the value of the property subject to taxation. All property in Wyoming is required by the Wyoming Constitution and Statutes to be assessed at its actual value.

Wyoming Constitution, Art. 15, Sec. 10.

W. R. S. 1931, 30-306.

Pittsburgh, C. C. & St. L. R. Co. v. *Backus,* 154 U. S. 421.

Western Union Tel. Co. v. *Taggart,* 163 U. S. 1.

Temmer v. *Denver Tramway Co.,* 18 F. (2d) 226, 229 (C. C. A. 8).

C. S. Ry. Co. v. *Guenther,* 19 F. (2d) 395, 400.

C. & N. W. Ry. Co. v. *Eveland,* 13 F. (2d) 442, 443 (C. C. A. 8).

So. Ry. Co. v. *Kentucky,* 274 U. S. 76.

Under the Wyoming constitutional provisions already quoted all property must be assessed at its actual value.

The duty of the county assessing officer to assess at actual value is imposed by Sec. 30-306, W. R. S. 1931, which provides that

> "it shall be the duty of the county assessor or his deputies to examine such property and place as near as possible the actual cash market value in money opposite each class of property listed for taxation."

There is no necessary connection between value and cost. In the case of *Pittsburgh, C. C. & St. Louis Ry.* v. *Backus,* 154 U. S. 421, dealing with this question, the Court said (429):

> "The value of the roadway at any given time is not the original cost, nor *a fortiori,* its ultimate cost after years of expenditures in repairs and improvements. On the other hand, its value cannot be determined by ascertaining the value of the land included in the roadway assessed at the market price of adjacent lands, and adding the value of the cross ties, rails, and spikes. The value of land depends largely upon the use to which it can be put, and the character of the improvements upon it. The assessable value, for taxation, of a railroad track can only be determined by looking at the elements on which the financial condition of the company depends, its traffic, as evidenced by the rolling stock and gross earnings in connection with its capital stock."

Conclusion.

The evidence clearly shows, and the trial court so found, its finding being affirmed by the Circuit Court of Appeals, that the complainant's property was systematically, arbitrarily and by the use of a wholly wrong principle and method, overvalued each year over a period of approximately five years, to the extent of more than $1,500,000.00. This finding of fact, agreed to by two

courts, should not be disturbed. As to the jurisdiction of the Federal equity court, there seems to us to be no doubt. The remedy provided by the state statute with reference to suits to recover back illegal taxes paid is not an adequate legal remedy, because it involves at least four law actions, one against each county, and probably as many more as there are municipalities and school districts within the counties. It is inadequate, also, because no provision is made for the recovery of interest and because, probably, the amount that at the time of filing the law actions would have been distributed by the county treasurers to the state, could not be recovered at all. The remedy provided by appeal under the state statute is uncertain, inadequate, and restricted to a state court.

We submit that the conclusions of the trial court and of the Circuit Court of Appeals were correct and that the decision of the Circuit Court should be affirmed.

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APPENDIX.

CONSTITUTION OF THE STATE OF WYOMING.

ARTICLE I, SECTION 28:

Tax—Consent to. No tax shall be imposed without the consent of the people or their authorized representatives. All taxation shall be equal and uniform.

ARTICLE II, SECTION 1:

Departments. The powers of the government of this state are divided into three distinct departments: the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.

ARTICLE V, SECTION 1:

Judicial power—How vested. The judicial power of the state shall be vested in the senate, sitting as a court of impeachment, in a supreme court, district courts, justices of the peace, courts of arbitration and such courts as the legislature may, by general law, establish for incorporated cities or incorporated towns.

ARTICLE V, SECTION 10:

District courts—Jurisdiction of. The district court shall have original jurisdiction of all causes at law and in equity and in all criminal cases, of all matters of probate and insolvency and of such special cases and proceedings as are not otherwise provided for. The district court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court; and said court shall have the power of naturalization and to issue papers therefor. They shall have such appellate jurisdiction in cases arising in justices' and other inferior courts in their respective counties as may be prescribed

by law. Said courts and their judges shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition, injunction and writs of habeas corpus, on petition by or on behalf of any person in actual custody in their respective districts.

ARTICLE XV, SECTION 10:

Duties of board of equalization. The duties of the state board shall be as follows: To fix a valuation each year for the assessment of live stock and to notify the several county boards of equalization of the rate fixed at least ten (10) days before the day fixed for beginning assessments; to assess at their actual value the franchises, roadway, roadbed, rails and rolling stock of all other property used in the operation of all railroads and other common carriers, except machine shops, rolling mills and hotels in this state; such assessed valuation shall be apportioned to the counties in which said roads and common carriers are located, as a basis for taxation of such property; provided, that the assessment so made shall not apply to incorporated towns and cities. Said board shall also have power to equalize the valuation on all property in the several counties for the state revenue and such other duties as may be prescribed by law.

ARTICLE XV, SECTION 11:

Uniformity of assessment required. All property except as in this constitution otherwise provided, shall be uniformly assessed for taxation, and the legislature shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal.

WYOMING REVISED STATUTES, 1931.

CHAPTER 115, ARTICLE 5, SECTION 512:

Appeals from board—Proceedings. Any person, persons, firm or corporation, who may feel aggrieved by the assessment or assessments by the board may take an appeal from the decision of the board to the district court of the county wherein the property or some part thereof is situated, where a trial *de novo* to the court shall be had.

The party or parties appealing shall, within sixty days after the decision of the board, file in the district court to which the appeal is taken a petition setting out the cause

of complaint, and a copy of the records of the board, all duly certified by the secretary of said board, and copies of said assessment or assessments.

The party appealing shall at the time of filing such appeal enter into an undertaking to be approved by the clerk or judge of said district court, and to be given to the state of Wyoming in such amount as the court or judge may fix, but in no case less than five hundred dollars ($500.00), and conditioned that the appellant shall prosecute the appeal without unnecessary delay, and for the payment of all costs, taxes, interest and penalties that may be ultimately levied on the property, the assessment of which is in controversy.

The clerk of the court shall immediately upon filing of the appeal notify the secretary of the board under the seal of the court, and supply him with a copy of the petition.

It shall be the duty of the attorney general and the county attorney of the county to which the appeal is taken to represent the board in proceedings on the appeal.

All proceedings on appeal except as herein otherwise provided shall be under the provisions of the code of civil procedure, as in other civil cases (L. '31, c. 73, sec. 41).

CHAPTER 115, ARTICLE 5, SECTION 515:

Tax levy made on valuation fixed by board. The county commissioners of the respective counties, in which any portion of any railroad, telegraph or telephone line may be situated, shall levy the requisite taxes for the year, upon the valuation of the property of said railroad, telegraph or telephone company, returned to them as aforesaid at the time provided by law for levying the other taxes. (L. '79 c. 6 sec. 3; R. S. '87, sec. 3841; R. S. '99 sec. 1796; L. '01, c. 50, sec. 3; C. S. '10, sec. 2360; C. S. '20, sec. 2814).

CHAPTER 115, ARTICLE 5, SECTION 516:

Manner of collecting taxes. The taxes assessed and levied upon the property of any railroad, telegraph or telephone company, under the provisions of this chapter, shall be collected at the time and in the manner provided by law for the collection of other taxes. (L. '82, c. 91, sec. 1; R. S. '87, sec. 3843; R. S. '99, sec. 1797; L. '01, c. 50, sec. 4; C. S. '10, sec. 2361; C. S. '20, sec. 2815).

CHAPTER 115, ARTICLE 18, SECTION 1804:

Investigation of return. The returns of railroad companies or corporations shall not be held to be conclusive as to the value of the property, but the state board of equalization shall, from all the information which it is able to obtain, find the true value of all such property, including tangible property and franchises, and shall assess the same on the same basis as other property is hereby required to be assessed. The valuation of each mile shall be determined by dividing the whole value by the number of miles of the main track of each road or line. (L. '23, c. 57, sec. 4).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 9.

THOMAS C. ROWLEY, AS TREASURER OF CONVERSE COUNTY, STATE OF WYOMING; CHARLES M. HALL, AS TREASURER OF FREMONT COUNTY, STATE OF WYOMING; ALTA PEARL MASSEE, AS TREASURER OF NATRONA COUNTY, STATE OF WYOMING; AND D. A. SHOOPMAN, AS TREASURER OF NIOBRARA COUNTY, STATE OF WYOMING,

Petitioners,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, A CORPORATION,

Respondent.

PETITION OF RESPONDENT FOR REHEARING AND CERTIFICATE OF COUNSEL.

SAMUEL H. CADY,
WILLIAM T. FARICY,
Of Chicago, Illinois,
ROBERT R. ROSE,
Of Casper, Wyoming,
Attorneys for Respondent.

THE GUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 9

THOMAS C. ROWLEY, as Treasurer of Converse County, State of Wyoming; CHARLES M. HALL, as Treasurer of Fremont County, State of Wyoming; ALTA PEARL MASSEE, as Treasurer of Natrona County, State of Wyoming; and D. A. SHOOPMAN, as Treasurer of Niobrara County, State of Wyoming,

Petitioners,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a Corporation,

Respondent.

PETITION FOR REHEARING

Comes now the above named respondent, Chicago and North Western Railway Company, and presents this its petition for a rehearing of the above entitled cause and in support thereof respectfully shows:

I.

OPINION OVERLOOKS REAL VICE OF MILEAGE FACTOR AS USED.

The opinion filed on the 5th day of November, 1934, overlooks the real vice of the "miles of road" factor as used

in this case. The opinion states that "where, as in this case, the evidence requires a finding that the railroad in one of the states reached by the system is clearly shown to be worth much less than the average value per mile of the system, an apportionment on mileage necessarily assigns an excessive amount to that state, and the use of that basis as the sole measure for the apportionment must be condemned as arbitrary."

If it is erroneous as a sole factor, there is no merit in using it at full face value with other factors which are proper. By so doing the effect of the bad factor is merely diluted. Its vice is none the less present, and its effect is just as easily traceable. The thing to do with mileage to get its use upon some reasonable basis, if it is to be used at all, is *first* to take the mileage figure itself and equate it to something which takes into consideration the vast differences within and without the state, and *then,* to put it in, *as so equated,* with the other factors. Merely to throw it in with the full force of its admitted vice, and trust to that vice being sufficiently diluted by factors which are sound, is only a difference in degree from using it alone.

Equating the mileage factor *before* using would give effect to the differences in cost, value and other characteristics between a mile of line within the state and one without the state. Thus, it has been shown in this case that on the basis of the Interstate Commerce Commission's appraisal as of June 30, 1917, with the net additions (additions less retirements) through the last full year preceding the assessment here complained of, a mile of line in Wyoming cost only 52.77 per cent of a system mile (R. 73). 52.77 per cent of 3.29 per cent (the percentage of distance of main line track in Wyoming to the whole system) is 1.736 per cent (R. 73). If mileage is to be used as a fac-

tor, equating it so as to give recognition to this difference should be done *first*, and *then* the factor put in with the others. It will be noted that the percentage 1.736 arrives in the same general neighborhood as the factors of traffic units (1.58 per cent), composite of gross and net revenues (1.89 per cent), and use of rolling stock (1.65 per cent).

When a number of different tests produce about the same result, that is suggestive of their approximate accuracy. But, when a factor produces a percentage approximately twice as high (3.29 in the case of mileage) that very fact suggests that there is something radically wrong with it. The things that make it wrong have been fully shown in the record and are recognized by this court in the statement first quoted herein from the opinion. Why, then, use the wrong factor uncorrected, and thus partly destroy the effect of the accurate factors?

Petitioners stressed the fact that the assessment as finally made was about 63 per cent of the mileage proportion of agreed system value, and the court, on page 5 of the opinion, evidently regarded this as satisfying the requirement that differences in quality, cost, value and earning power of a mile within and without the state must be taken into consideration. But this overlooks the fact that 63 per cent is merely the average of the good and the bad,—with the accuracy of the good affected by the vice of the bad. A true recognition of the difference between a mile within and without the state would make the percentage about 44.75 instead of 63. This can be computed from plaintiff's Exhibit J-1 (R. 64, 65). A mile of Wyoming line produces 44.52 per cent of the revenue that is produced by an average system mile. It moves 43.02 per cent of the traffic units moved by an average system mile. It uses 46.73 per cent of the rolling stock used by an average system mile. On these bases a mile of Wyoming line is worth $19,858